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CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

FROM JUNE 28, 1886, TO DECEMBER 21, 1886.

REPORTED BY

A. MOORE BERRY, OF THE ST. LOUIS BAR,

AND

JAS. F. MISTER, OF THE KANSAS CITY BAR,

OFFICIAL REPORTERS.

VOL. XXIII.

COLUMBIA, MO.:

E. W. STEPHENS, PUBLISHER.

1887.

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Columbia, Mo.

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JUDGES OF THE

ST. LOUIS COURT OF APPEALS.

HON. EDWARD A. LEWIS, *Presiding Judge.*
HON. SEYMOUR D. THOMPSON, } *Judges.*
HON. RODERICK E. ROMBAUER, }

JOHN LEWIS, *Clerk.*
A. MOORE BERRY, *Reporter.*

JUDGES OF THE

KANSAS CITY COURT OF APPEALS

HON. JOHN F. PHILIPS, *Presiding Judge.*
HON. JAMES ELLISON, } *Judges.*
HON. WILLARD P. HALL, }

FINIS C. FARR, *Clerk.*
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CASES DETERMINED

IN THE

St. Louis and Kansas City

COURTS OF APPEALS.

MARCH TERM, 1886.

George N. Nolan, Administrator (Interpleader), Respondent, v. Lewis Deutsch, Appellant.

Kansas City Court of Appeals, June 28, 1886.

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Practice—Interpleader—Issues in Attachment—Case Adjudged. Where property was taken in attachment, and, pending an order of sale, because of the property being perishable, an interplea was filed by the administrator of the claimant of the property attached, on the first day of the term to which the writs in the attachment suits were returnable and of the first term after these proceedings were put in motion, but *after* the sale of the property under the order of sale aforesaid; the issue on the interplea is *still*, whether the property is the property of the interpleader or not, and the verdict must respond to that issue. If the *verdict* is that the property belongs to the interpleader, then the *judgment* may properly be, that he recover the proceeds of the sale.

Appeal from Lafayette Circuit Court, Hon. John P. Strother, Judge.

Affirmed.

Statement of case by the court.

On May 16, 1883, Baggs & Smiley were running a

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saloon in Higginsville, Missouri, known as the Marble Hall; there was no other sign on the building. On that day Isaac H. Reed bought out the saloon stock and fixtures of Baggs & Smiley. An invoice of the articles sold was made and price agreed upon and payment made, Reed procuring the conveyance of a house and lot, which he had before that time bought, but for which he had not taken a conveyance, to Baggs for four hundred dollars, and giving a note with approved security to Smiley for four hundred dollars upon the purchase. There were some odds and ends of liquors, etc., not included in the sale or inventory, which remained the property of Baggs & Smiley, and which they continued to sell to close the same out. The next day Reed returned to Independence, taking with him five barrels of whiskey, part of the property purchased. A few days afterwards Reed returned to Higginsville and took possession of the house and remaining articles. On the same day the attachment of appellant Deutsch v. Baggs & Smiley was levied on the property, the sheriff obtaining possession by getting key of Reed, upon threats of breaking in forcibly.

On May 28, an order of sale was made by the judge of said court in vacation, as being perishable, etc., property. On June 2, 1883, Isaac H. Reed died. On June 6, 1883, the property was sold under the judge's order aforesaid, and on August 6, 1883, on the first day of the term to which the writs in the attachment suits were returnable, and of the first term after these proceedings were put in motion, J. H. Slover, the first predecessor of this respondent, as administrator of Isaac H. Reed, filed this interplea.

The trial resulted for the interpleader, and defendant appeals.

BOGGESS & MOORE, for the appellant.

I. The case falls under section 2505, Revised Statutes, and must be determined by it on the undisputed facts

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disclosed by the evidence; the sale was fraudulent as matter of law. The tardy possession finally taken could not purge the original *virus*, and the court ought to have so declared, and erred in giving the *first* and *fourth* instructions for the interpleader. *Claflin v. Rosenberg*, 42 Mo. 439; *Stern v. Henly*, 68 Mo. 262; *Wright v. McCormick*, 67 Mo. 426.

II. The finding of the jury was against the evidence, and contrary to the law, as declared by the court, taking all the instructions as a whole.

III. The court erred in overruling defendant's motion for a new trial.

IV. The right to interplead and claim property which has been attached, is a purely statutory right, in derogation of the common law, and must be strictly construed and strictly pursued. In this case the property had been sold and converted into money long before the interplea was filed. The judgment rendered was without the jurisdiction and power of the court, as neither the sheriff nor the attaching creditor held the property, claimed in the interplea, and was, for that reason, erroneous, if not void. *Hewson v. Tootle*, 72 Mo. 632.

WALLACE & CHILES, for the respondent.

I. The instructions complained of, given by the court for interpleader, are in the language of the statute, and, also, of the decisions quoted by appellant. *Claflin v. Rosenberg*, 42 Mo. 439; *Wright v. McCormick*, 67 Mo. 426; *Stern v. Henly*, 68 Mo. 262; *Stewart v. Nelson*, 79 Mo. 524. There was complete possession taken of a larger part in value of the property sold, and an invoice taken of *all the property*, the *sign*, which was simply the name of the house, and not of any person, did not need removal.

II. The court could not, as a matter of law, declare the sale void; nor was the finding of the jury against the evidence. The evidence was conflicting, but there is ample to sustain the verdict; and where there is any

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evidence, the case must go to the jury and their verdict be taken as conclusive on matters of fact. *Johns v. McAllister*, 30 Mo. 327; *Weber v. Armstrong*, 70 Mo. 217; *Hewson v. Tootle*, 72 Mo. 632; *Stewart v. Nelson*, 79 Mo. 522.

III. There is nothing in the objection to the interplea being filed *after* sale of property, *etc.* It was filed in the time prescribed by the statute, there was no authority nor occasion to file it earlier; and the owner's right to it cannot be prejudiced by the hasty sale of it, on an *ex parte* application claiming that it was perishable, almost while the funeral of the owner was in progress.

IV. The finding is sustained by the evidence, and the instructions fairly presented the law of the case.

ELLISON, J.—All of the instructions asked, by appellant were given. He complains of two given for interpleader, but we regard them as correct under the facts as summarised in the statement of the cause. The facts do not make out a sale, void as a matter of law under the statute, and the court was not asked to so declare it.

The following is one of the chief causes, alleged in the assignment of errors, for a reversal of the judgment, viz.: "The attached property having been sold before the filing of the interplea, any finding and judgment for the interpleader in the case was and is erroneous."

The judgment rendered in this case is not set out in appellant's abstract, but it will be observed that the objection is, that *no* judgment can be had for interpleader on account of the property having been sold by order of court, under the attachment law concerning perishable property. I think the objection is not good. In *Hewson v. Tootle* (72 Mo. 632), the issue was, as in this case, whether the property attached was the property of the interpleader, and the verdict was: "We, the jury, find for the plaintiffs $542.75," and the judgment on the verdict was, that plaintiff have and recover the proceeds

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arising from the sale of the goods by the sheriff, who is thereby ordered to pay the proceeds to the interpleader. That verdict was held not responsive to the issue, and, in consequence, the judgment thereon erroneous, but it is expressly stated, in that case, that if the verdict had been that the attached property was interpleader's, the judgment rendered would have been proper.

Where property attached has been sold, the issue on interplea is still, whether the property is the property of interpleader or not; and the verdict must respond to that issue, instead of being for money, as in the case *supra*. If the verdict is that the property belongs to the interpleader, then the judgment may properly be that he recover the proceeds of the sale. We discover no error justifying a reversal, and affirm the judgment. All concur.

WILLIAM LIGHTFOOT, Respondent, v. WILLIAM WILMOT ET AL., Appellants. 23 5 / 34 382 / 23 5 / 40 152

Kansas City Court of Appeals, June 28, 1886.

JUDGMENTS—ISSUES PRESENTED AT TRIAL—RES JUDICATA—CASE ADJUDGED.—When a number of issues are presented, the *finding* in any *one* of which will warrant the verdict and judgment, it is competent to show that the finding was upon *one* rather than *another* of these different issues; if it appears *prima facie* that a question has been adjudicated, it may be proved by *parol* that such question was *not, in fact*, decided in the former suit; and where matters *could* have been proved in a former action, the presumption is that they were proved, but this presumption may be *rebutted* and overthrown. In the case of a *second* suit against the same defendants, unless *such* evidence is produced *as to such issues*, the former judgment is *prima facie* a protection to defendants. That the former judgment was by *agreement*, as in this case, will not aid plaintiff; it is, at least, to be taken as of the same force and effect

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as if rendered by the court on the evidence received, under the pleadings.

APPEAL from Caldwell Circuit Court, HON. JAMES M. DAVIS, Judge.

Reversed.

Statement of case by the court.

This action was originally begun before a justice of the peace, on an account, in words as follows:

"Nancy M. Perkins and Wm. Wilmott in account with Wm. L. Lightfoot, Dr., Nov. 30, 1883, to 7½ days work as brick mason, at $4 per day, ...$30.00."

On the back of the account there was this endorsement: "Without recourse, I assign within account to William Lightfoot. M. A. SWITZER."

After trial in the justice's court, the defendant took an appeal to the circuit court, where the case was tried anew at the October term, 1884.

The bill of exceptions shows: "The plaintiff, to maintain the issues on his part, offered evidence tending to show that plaintiff rendered the services in his account mentioned, upon the Gapen building, at the instance and request of the defendants, and that the price charged was reasonable for such services. The plaintiff sought to recover on the promises of the defendants to pay for the services, and not on the ground that they had become the owners of the Gapen building. It was then agreed between the parties (*a*) that after said indebtedness had accrued to the plaintiff, he filed in the office of the clerk of the circuit court of Caldwell county a verified account for work and labor done on the Gapen building, for the purpose of obtaining a mechanic's lien on lot six, block three, in Kingston, on which said Gapen building was constructed; in which account the balance claimed was the same amount claimed in this case. (*b*) It is further agreed that plaintiff afterward transferred, by written assignment, said account to Milton A. Switzer, and that

Switzer then brought suit on said account, with other accounts, against Heiser and others, in the circuit court of Caldwell county, to enforce said lien, and that in the count on the account herein sued on, he declared in that suit that he performed the work and labor upon the building at the instance and request of the defendants in this suit. That suit was against Heiser, as administrator of Gapen, Cora R. Gapen, Nancy M. Perkins, and William Wilmott.

"Defendants Perkins and Wilmott filed their answer to that suit, the substance of which was, that they denied all the allegations of the petition except (1) that Eli Gapen owned the lot in question and was engaged in constructing a brick building thereon; (2) that Mrs. Perkins loaned him funds, and was secured by deeds of trust on said property, as in the first count of the petition described; (3) that Gapen conveyed said property to Klepper, who conveyed the same to Mrs. Gapen, as therein stated; (4) that Gapen died, and Heiser was appointed administrator of his estate. And for further answer, Mrs. Perkins said that the sums loaned Gapen were loaned and secured by deeds of trust on said property, before Gapen began the construction of the building on said lot, and that the deeds of trust were the first liens on said lot, and entitled to priority of satisfaction out of the same.

"The following judgment was entered, by agreement, in that suit, to-wit:

"'Now, on this day, comes the parties hereto, and, by agreement, the plaintiff is to have judgment for the amount of the several counts in his petition filed herein, to be declared a lien on the real estate described in the petition, and to be levied of said real estate; it being further agreed that the several deeds of trust in favor of Nancy M. Perkins on said real estate be declared and held a prior lien on said real estate to the several demands of the plaintiff, as set forth in his petition. It is further agreed between the parties thereto that there is

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due to the plaintiff, and he is entitled to recover, $74.34, on the first count of his petition ; * * * thirty-one dollars on the eighth count ; * * * and that the total amount due the plaintiff on the several counts in his petition is $452.99. It is also admitted and agreed that the several demands of the plaintiff were for work and labor performed, and material furnished, in constructing a building on lot number six, in block number three, in the town of Kingston. It is, therefore, ordered and adjudged by the court that the plaintiff recover the said sum of $452.99, and his cost herein expended ; and that the same be levied of said real estate, to-wit : Lot six, in block three, in said town of Kingston, and that special *fieri facias* issue therefor.'

"It was then agreed that the account sued on is the one mentioned in the eighth count of the petition of Switzer against Heiser *et al.;* the same having been re-assigned by Switzer to the plaintiff."

CROSBY JOHNSON, for the appellants.

I. Where the subject-matter has been in litigation before, it will be deemed *res judicata*, unless the evidence precludes all hypothesis of the merits having been passed on. *Baxter v. Aubrey*, 41 Mich. 90; *Peterkin v. Thomas*, 28 Ohio St. 596. Where issue is joined so that evidence *might* have been introduced, the failure to introduce the evidence will not deprive it of its character of *res judicata*. *Railroad v. Straat*, 59 Mo. 351; *Cromwell v. Sac. Co.*, 94 U. S. 351; *Case v. Beauregard*, 101 U. S. 688; *Tutt v. Price*, 7 Mo. App. 194. And the fact that the judgment is indefinite and uncertain, will not alter the effect of a judgment rendered upon it. *Chouteau v. Gibson*, 76 Mo. 38.

II. In the enforcement of a mechanic's lien the plaintiff is entitled to a personal judgment against *contractors*, as well as special judgment against the property. Sects. 3180, 3185, Rev. Stat.; *Williams v. Porter*, 51 Mo. 448; *Hassells v. Rust*, 64 Mo. 325. And the court

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may grant any relief consistent with the case made, and embraced in the issues, whether asked or not. Bliss on Code Pleading, sect. 161. The omission to grant any relief to which the petition showed the plaintiff was entitled was equivalent to an adjudication that he was not entitled to such relief. Freeman on Judgments, sect. 272; *Caldwell v. White*, 77 Mo. 421. If the allegations of Switzer's petition were true, defendants were contractors. Whittelsey's Pleading, 187.

III. The causes of action set forth in Switzer's petition (former adjudication), were merged in the judgment in his favor. *Cooksey v. Railroad*, 74 Mo. 477; Freeman on Judgments, sect. 215. A party will not be allowed to try his case by piecemeal. *Brooks v. Ancell*, 57 Mo. 178; *White v. Van Houston*, 51 Mo. 577; *Wickersham v. Whedon*, 33 Mo. 56. And a judgment by agreement has the same force and effect upon all matters *in issue* in the cause as other judgments. *Reilly v. Hudson*, 62 Mo. 383; *Black v. Rogers*, 75 Mo. 441; *Nashville, etc., v. United States*, 113 U. S. 261; Freeman on Judgments, sect. 329; *Stapleton v. Dee*, 132 Mass. 279. Plaintiff could claim no greater rights than Switzer.

WILLIAM A. WOOD, for the respondent.

I. Before the matter of two actions can be *res judicata* there must be a concurrence of four conditions: (1) Identity in the thing sued for. (2) Identity in the cause of action. (3) Identity of persons and parties to the action. (4) Identity of the quality in the person for or against whom the action is brought. 2 Bouv. Law Dic. (15 Ed.) 579; *Clemens v. Murphy*, 40 Mo. 121; Big. Estop. (3 Ed.) 10. These necessary elements do not appear in the case at bar, and the case introduced in evidence, by defendants, on the trial below. No one is estopped in a proceeding *in rem* from *also* recovering a *personal* judgment for the same matter, especially if

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the property charged fails to satisfy his claim, as in this case.

II. If the *merits* of the matter in dispute were not passed upon, the judgment is no bar to another action. *Spalding v. Conway*, 51 Mo. 51; Phil. om Mech. Liens, sects. 212, 307, 311, 312; Big. on Estoppel, 37, 175; *Reilly v. Hudson*, 62 Mo. 383; *Barnes v. Railroad*, 71 Mo. 163; *Thompson v. School District*, 71 Mo. 465. The record must show, to be an estoppel, that the issue was taken in the *first* suit, on the same allegations which are the foundation of this action. *Spalding v. Conway*, 51 Mo. 51; *Spurlock v. Railroad*, 76 Mo. 67; *Railroad v. Traube*, 59 Mo. 353.

C. S. McLaughlin, also, for the respondent.

I. No personal judgment was asked against either of the defendants in the *first* suit, the sole object being to enforce a lien against the property. In the present case, the record shows that recovery is sought on the promises of defendants to pay for the services. The present parties were necessary parties to the *first* suit in order to enforce the lien against the property. Sect. 3180, Rev. Stat.; *Gail v. Blaikie*, 126 Mass. 274. No *personal* judgment was asked for or rendered in the *first* suit, and it is no bar to the present action.

II. The doctrine of *res judicata* is not applicable here. There is no identity in the cause of action, or of persons, or of parties. *Atchison Railroad v. Commissioners*, 12 Kas. 127; Freeman on Judgments, ch. 12. It must appear, not only that the matter was properly in *issue* in the former trial, but also that the verdict and judgment necessarily involved its determination. *Hickerson v. City of Mexico*, 52 Mo. 62; *Spalding v. Conway*, 51 Mo. 51.

III. The claim made here is a distinct cause of action. A judgment in a proceeding *in rem* is no bar to any future action on same demand.

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ELLISON, J.—From the statement in this cause, it will be noticed that the account in this suit was originally plaintiff's, and that, after filing his mechanic's lien thereon in the clerk's office, he assigned it to M. A. Switzer; that Switzer then brought suit on it, in connection with other demands, in which suit the present defendants were defendants; and that he charged the work and labor was done at the instance and request of the present defendants; that they answered to that action, denying the allegation that the work was done at their request. That, in that action, a judgment was rendered by agreement, which judgment likewise covered the demand here sued on. It will be further observed that this judgment was special, against the property, and not personal, and after it was rendered Switzer assigned the account back to plaintiff, who instituted this action for a personal judgment against defendants, in which he gives evidence tending to prove the work was done at the instance and request of defendants, as was alleged in the suit by Switzer.

There were other matters stated in the abstract presented by the parties, but the above summary is believed to be sufficient to dispose of the case. It is said in *Hickerson v. City of Mexico* (58 Mo. 61), that "when a number of issues are presented, the finding in any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than another of these different issues. * * * If it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not, in fact, decided in the former suit. Where matters could have been proved in a former action, the presumption is that they were proved, but this presumption may be rebutted and overthrown." Under the allegations in the petition of Switzer, to enforce a mechanic's lien on this and other claims, it would have been competent to render judgment against defendants,

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personally, for the claim in this suit. They were not only shown, by those allegations, to be interested in the building sought to be charged, but the work was alleged to have been done at their request. The result of that action was a judgment not against them personally. It certainly would, then, appear *prima facie* that the question in this case was determined in that, and if plaintiff asserted to the contrary, he should have offered parol testimony to that effect. He has not done so, so far as is shown by the abstract not controverted by him.

That the judgment was by agreement, does not aid plaintiff. It is maintained by respectable authority that such judgment is deemed an absolute settlement of all matters in issue in the pleadings; but that we need not and do not decide. It is, at least, however, to be taken as of the same force and effect as if rendered by the court on the evidence received under the pleadings.

The judgment is reversed. The other judges concur.

WESLEY TURNER, Respondent, v. THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 28, 1886.

1. PRACTICE — VERDICT, GENERAL AND SPECIAL—CONSTRUCTION OF SECTION 3629, REVISED STATUTES.—Section 3629, Revised Statutes, as amended by the act of 1885 (Laws of Mo., 1885, p. 214.), concerning special and general verdicts, provides as follows: "In all actions the jury shall, upon the issues made up and submitted to them by the court, return a *general* verdict; and the court, upon request of either party, shall direct the jury, under proper instructions, to find a special verdict upon all or any of the *issues* submitted to them, which submissions shall be in writing, distinctly specifying each issue on which the jury are to find, and such special

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finding shall be recorded with the verdict," etc. *Held*, that the statute only intends that *issues* in the cause shall be submitted to the jury for special finding, and not particular questions of fact, as in some other states. *Held, further*, that the object of the statute is that the very right between the litigants should be ascertained, and submission should be such as will assist to this end, and not such as will tend to mislead or confuse.

3. ——— EVIDENCE—OPINION OF WITNESSES AS TO SANITY—OPPORTUNITIES FOR JUDGING.—In order that an opinion of a *non-expert* witness on the question of sanity may go to the jury it should be accompanied by some of the facts on which such opinion is based. Before a witness should be received to testify as to the condition of mind, it should appear that he had an adequate opportunity of observing and judging of capacity.

APPEAL from Platte Circuit Court, HON. GEORGE W. DUNN, Judge.

Reversed and remanded.

The case is stated in the opinion.

STRONG & MOSMAN, for the appellant.

I. The court erred in permitting evidence of Chute to be read to the jury, against defendant's objection. *Appleby v. Brock*, 76 Mo. 314; *State v. Erb*, 74 Mo. 205; *State v. Klinger*, 46 Mo. 229; *Byern v. Donnell*, 80 Mo. 335; *Pidcock v. Porter*, 68 Pa. St. 342. The court erred in permitting evidence as to damage to the colt by reason of the killing of its dam. It was irrelevant and incompetent under the pleadings, and too remote, in any event. *Price v. Ry.*, 72 Mo. 496.

II. The instructions given for plaintiff were erroneous, being inconsistent, self-contradictory, ambiguous and misleading. *Turner v. Ry.*, 78 Mo. 580; *Cathcart v. Ry.*, 19 Mo. App. 113; *Young v. Ridenbaugh*, 67 Mo. 584. They submitted to the jury a question of law, viz: The competency of testimony. *Fugate v. Carter*, 6 Mo. 273.

III. The court erred in overruling instructions asked by defendant. One was in the nature of a demurrer to

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the evidence; there was total failure of proof that the failure to give signal caused the injury. *Holman v. Ry.*, 62 Mo. 562; sect. 806, Rev. Stat.

IV. The court erred in overruling defendant's motion for judgment on the special findings. Laws of Mo., 1885, p. 214; *Ry. v. Foley*, 38 Ia. 591; *Morrow v. Com.*, 21 Kan. 504; *Ry. v. McCandliss*, 33 Kas. 366; *Fleetwood v. Dorsey Mach. Co.*, 95 Ind. 491.

V. It was error to overrule defendant's motion in arrest. The general verdict and special finding are part of the record. Laws of Mo., 1885, p. 214. And on the face of the record there was apparent error—conflict.

VI. It was error to overrule defendant's motion for new trial. Authorities cited above; *Callahan v. Warne*, 40 Mo. 131.

No brief for respondent.

ELLISON, J.—On an appeal from a justice of the peace in Platte county, there was filed in the office of the clerk of the circuit court, in said county, on the fourth day of September, 1879, the transcript and papers in this case. The cause was tried, and defendant appealed to the supreme court, where the judgment in plaintiff's favor was reversed and the cause remanded. 78 Mo. 578.

The statement is as follows: "Plaintiff states that the defendant is a corporation, and that, on or about the sixth day of July, 1879, in Lee Township, Platte county, state of Missouri, it was the owner and occupier of a certain railroad, with the cars and locomotives thereto belonging, and then and there operating the same through the township aforesaid.

"That on said day, in said township, county and state, the defendant, by its officers and agents, while running its locomotives and cars upon said railroad, caused the same to approach and pass over a traveled public road, the same being the public highway leading from Platte

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City to East Leavenworth, in said county, without ringing the bell of said locomotive or sounding the steam whistle thereon, as required by section thirty-eight, article two, of chapter thirty-seven of Wagner's Missouri Statutes.

"That by reason of such neglect of defendant, its officers and agents, and without any fault or negligence of plaintiff, the said locomotive struck certain animals belonging to plaintiff, to-wit: Two horses and one sucking colt, and wounded the colt and injured it badly and killed the two horses, to plaintiff's damage in the sum of two hundred and fifty dollars, for which sum he prays judgment."

The cause came on again for trial in the Platte circuit court, on August 12, 1885, before a jury, and there was a verdict for plaintiff for $100.

At defendant's request, the jury were instructed to find a special verdict, under section 3629, Laws of 1885, 214. There were many submissions made to the jury; among them were the following, with the return of the jury in response thereto:

Q. "Was the whistle sounded before the engine reached the crossing?"

A. "Yes."

Q. "How many times was it sounded?"

A. "The evidence conflicted. We cannot tell."

Q. "How far below the crossing was the train when the first whistle sounded?"

A. "From the evidence we cannot tell."

Q. "Was the bell rung before the train reached the crossing?"

A. "Yes."

Q. "How far below the crossing was the train when they commenced to ring the bell?"

A. "We cannot tell."

Defendant made a motion for judgment on the verdict, which was overruled.

I. This statute is new in this state and we are not

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aware of any case arising prior to this one in which a construction thereof is involved.

The motion is based on the fact that the jury answered, "we cannot tell," to the second, third and fifth interrogatories.

If we considered these interrogations, or submissions, proper, under the section above referred to, we should hold the defendant entitled to the judgment, for it is provided that, "whereon the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

When, on proper submissions, the jury answer they do not know, or cannot tell from the evidence, it is equivalent to a finding that such facts are not proved. Before defendant could be rendered liable in this action the evidence must show that it failed to ring the locomotive bell continuously from a point at least eighty rods from the crossing, till its engine shall have crossed the road; and that it failed to sound the whistle at a point at least eighty rods from the crossing, and at intervals till the crossing shall have been passed. And that the injury happened by reason of this neglect. *Van Note v. Ry. Co.*, 70 Mo. 641.

In order to become liable, the defendant must have neglected, both to ring the bell and to sound the whistle; if it did either, it is not liable.

These are "issues" to which, if the jury answer they cannot tell how the fact is, the case is not proved and must fall.

In Kansas, where a similar statute exists, the supreme court says: "The general verdict is an affirmation that these charges are true. In other words, it affirms them. Turning now to the special questions, we find that to several, the jury simply answered: "Don't know. * * * A case is to be tried upon the evidence, and according, as an alleged fact, is, or is not established by that evidence, it does, or does not, for the purpose of

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that case, exist. The main object of special questions is to bring out the various facts separately, in order to enable the court to apply the law correctly, and to guard against any misapplication of the law by the jury." * * * The special findings "imply a denial of the existence, or perhaps, more correctly, of the proof of the existence of the facts concerning which the questions were propounded. And one, for all purposes of the case, is the same as the other. And this *lack of proof operated against the party who needs to make the proof.*" *Morrow v. Comrs.*, 21 Kan. 504.

"The failure of a jury to answer special questions presented to them, for the reason, as expressed by them, that the evidence is conflicting and they cannot answer, is generally equivalent to a finding that the facts, concerning which they are asked to make findings, do not exist, or are not proved." *Ry. Co. v. McCandliss*, 33 Kas. 366.

So, I repeat, that did we consider the interrogations proper, we should hold defendant's motion for judgment should have been sustained. But I do not deem them proper. Our statute, though similar to those in force in Kansas and Indiana, is unlike them in some material respects. Our statute is as follows: "Section 3629. In all actions, the jury shall, upon the issues made up and submitted to them by the court, return a general verdict, and the court, upon request of either party, shall direct the jury, under proper instructions, to find a special verdict upon all or any of the issues submitted to them, which submissions shall be in writing, distinctly specifying each issue on which the jury are to find, and such special finding shall be recorded with the verdict," etc.

The Indiana statute (2 Rev. Stat. 1876, p. 171, sect. 336), besides providing for a special verdict "upon all or any of the issues," declares that, when requested by either party, the court shall instruct the jury that, "if they render a general verdict, to find specially upon par-

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ticular questions of fact, to be stated in writing." And the Kansas statute (3814) section 286, (sec. 286) section 7, compiled laws 1879, provides that, "in all cases the jury shall render a general verdict, and the court shall, in any case, at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same."

It will be noticed that the Missouri statute is, that the interrogations shall be "upon all or any of the *issues*," while those of Indiana and Kansas authorize a finding "upon *particular questions of fact*." So it has been held in Indiana that, "by particular questions of fact, something less than an issue presented in the case is intended." *Todd et al. v. Fenton et al.*, 66 Ind. 25. Particular questions of fact in Indiana embrace only a particular question pertinent to, but not covering any of the issues; while a special verdict covers the issues. *The Toledo, W. & W. Ry. Co. v. Hammond*, 33 Ind. 379.

Among the issues in this case was, whether the whistle was sounded at least eighty rods from the crossing, and at intervals until the engine passed the crossing. But the question submitted did not put this issue to the jury. The question was, "how many times was it (the whistle) sounded?" The jury answered, no doubt truly, "we cannot tell." That is, they could not tell whether it had been sounded six or a dozen times, or more or less, but they might have been well able to say, it was sounded at intervals, the exact number "we cannot tell." So the jury were not able to say just how far the engine was from the crossing when it first whistled, but they might well have been able to say, it was at least eighty rods. The same may be said of the questions concerning the bell.

It is apparent that our statute only intends that issues in the cause shall be submitted to the jury for special finding. And since the case, for reasons herein-

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after stated, will be re-tried, it may be as well to state here, that many of the other submissions made to the jury, at defendant's request, there being nineteen in number, were also improper. It was not intended by this statute that the jury were to be subjected to a cross-examination by counsel, under the guise of laying the foundation for a special verdict. The object of the statute was, that the very right between the litigants should be ascertained, and submissions should be such as will assist to this end, and not such as will tend to mislead or confuse. In Indiana, where, as we have seen, the statute is much broader than with us, and where larger liberty of interrogation is permitted, the court held that, "the statute was intended to provide a proper means of securing a fair trial and a proper verdict, and should not be used for the purpose of confounding, confusing, or misleading the jury." *Manning v. Gasharie*, 27 Ind. 399.

It is the better practice, however, that objection should be made at the trial to any submission thought to be improper.

II. On the former trial of the cause, one A. L. Chute was a witness. His evidence was incorporated in the bill of exceptions taken to the supreme court. At the last trial a witness was asked the following questions, preparatory to introducing Chute's evidence as set out in the bill of exceptions.

Q. "Do you know A. L. Chute?"

A. "Yes, sir."

Q. "Do you know his condition?"

A. "Yes, sir. He is what I would call—'He is crazy.'"

Q. "Crazy as a bed bug."

A. "Yes, sir."

Q. "Did you hear his testimony at the last trial?"

A. "Yes, sir, I heard it."

Defendant objected to the testimony and objected to the questions propounded to the witness, which were

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overruled. Chute's evidence, as contained in the bill of exceptions, was then read to the jury. This was an error for which the judgment will be reversed. In order that an opinion of a non-expert witness, on the question of sanity, may go to the jury, it should be accompanied by some of the facts on which such opinion is based. "Before a witness should be received to testify as to the condition of mind, it should appear that he had an adequate opportunity of observing and judging of capacity." *Baldwin v. State*, 12 Mo. 223; *Appleby v. Brock*, 76 Mo. 314; *Moore v. Moore*, 67 Mo. 192; *Crowe v. Peters*, 63 Mo. 429. It is evident that the above questions and answers do not meet the requirement of these authorities. There are no facts elicited from the witness showing on what his opinion was based, or what were his means of observation.

For this error the judgment will be reversed and the cause remanded. All concur.

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65	64

ADAM HOFFMAN, ADMINISTRATOR DE BONIS NON OF W. ADAMSON, DECEASED, Respondent v. JOSEPH C. PARRY, Appellant.

Kansas City Court of Appeals, June 28, 1886.

1. STATUTE OF LIMITATIONS—PURPOSE AND CONSTRUCTION OF SECTION 3244, REVISED STATUTES.—Section 3244 Revised Statutes (concerning limitations), provides, that "if any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented." It has been the uniform construction of this statute that it was not designed to protect such plaintiffs as were simply *ignorant* of the *existence of the facts* entitling them to bring suit "unless that ignorance is occasioned or

brought about by some improper conduct on the part of the defendant." It is the *doing* of some improper act, calculated to throw the plaintiff *off his guard*, some act of concealment or suppression *where the party ought to speak*, that suspends the operation of the statute of limitations.

2. PRINCIPAL AND AGENT—SUB-AGENT—RELATION TO HIS PRINCIPALS—CASE ADJUDGED.—Where, from the nature of the case, and the method of making collections, as where the matter is to be prosecuted at a distance (in this case, Washington City), the business must be conducted by a sub-agent; and one of the joint principals selects such sub-agent and advises his fellow of it, who, by not objecting, acquiesces in it; the sub-agent is as much the agent of the latter as of the former, and he can maintain action directly against the sub-agent on any liability growing out of his employment.

3. PLEADING—PRACTICE—CASE ADJUDGED.—Under the general issue defendant may prove any fact which goes to show that plaintiff never had a cause of action against him. And under it, *in this case*, the defendant was entitled to make any proof which included a fact within the terms of the allegations necessary to support the plaintiff's case, and as he cannot be held to anticipate the line of evidence the plaintiff may pursue, he must, *ex necessitate*, be permitted to meet such proof under the general issue.

4. PRACTICE—ISSUES—INSTRUCTIONS—CASE ADJUDGED.—An instruction which authorizes a recovery should embrace all the issues which there is any evidence to support. *Here* the instructions given entirely ignored the defence of the statute of limitations.

APPEAL from Barton Circuit Court, HON. CHARLES G. BURTON, Judge.

Reversed and remanded.

Statement of case by the court.

The petition charges that in 1862, one Washington Adamson delivered to defendant certain vouchers held by him on the government of the United States for horses sold by Adamson to said government, calling for the sum of four hundred dollars, and that defendant agreed and undertook to collect the same for Adamson; and that defendant did collect the same. That Adamson died intestate in the year 1863. There were successive letters of administration granted on his estate, until the plain-

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tiff was appointed administrator *de bonis non* in 1866. It is then alleged that defendant did not collect said money until after the death of Adamson; and that he concealed from the widow of Adamson, while she was administratrix, and from this plaintiff, the fact that he had received said vouchers and collected the money thereon, and that they had no knowledge thereof until after final settlement and discharge of said administrator. The probate court re-appointed plaintiff such administrator *de bonis non* for the purpose of this action in 1883. The petition asks judgment for the sum so collected with interest from date of collection.

The answer tended the general issue, and the plea of the statute of limitations. The reply denied the bar of the statute of limitations, and alleged "that defendant, by concealment of the facts alleged in the petition, prevented the bringing of the action on account thereof until within less than five years before this suit was commenced."

The cause was tried before a jury. The plaintiff's evidence tended to show that in 1862 the defendant went to Fort Scott, Kansas, to sell some horses to the government, and at the request of Adamson took certain horses for him to sell as an accommodation for Adamson. The horses were accordingly turned over to the government in the name of defendant, and a voucher was issued therefor, together with the amount of defendant's horses, in the name of defendant. This was done, presumably with the assent of Adamson, to facilitate collection. Defendant gave this voucher to Nathan Bray, an attorney at law, resident near by, for collection. After Adamson died, both his widow and the administrator had conversations with defendant, in which he told them he had so placed the voucher in the hands of Bray, and that nothing had been collected, and that he had never received anything on it. This was as early as 1866.

Plaintiff also introduced evidence showing that in 1867 a power of attorney had been executed by defendant

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to one Sutherland, of St. Louis, authorizing him to collect said voucher, and evidence that the money on the voucher had been paid by the government to said Sutherland in 1867. There was no proof that defendant had ever received this money from Sutherland. The defendant's testimony was, in substance, that he had put Adamson's horses in with his to sell, for Adamson's accommodation, as a neighbor; that the voucher was given for the whole number of horses sold, and that, being unable to obtain the money short of Washington City, he handed the voucher to Nathan Bray for collection, who was a man of high character. and a reputable lawyer. That he was acting in this matter both for himself and Adamson, and without any hire; that he frequently made inquiry of Bray about the collection, and that Bray always told him he had not been able to collect the money; and that he so reported the fact to plaintiff and the widow. In respect of the power of attorney to Sutherland, he testified that he had no recollection whatever of making such an instrument to him; that he signed such papers respecting the collection of the claim as were presented to him by Bray, and supposed the paper was made to him; that he never saw or heard of the man Sutherland before this controversy, and had no knowledge of his having collected the money; and that he never received one cent from Sutherland or any other person on account of said voucher. The larger portion of this voucher belonged to defendant for his own horses.

Nathan Bray appears to have died some time prior to the institution of this action.

Under the instruction of the court the jury found the issues for plaintiff, and judgment was entered accordingly. Defendant has appealed.

THURMAN & WRAY, for the appellant.

I. A married woman is not a competent witness for or against her husband in a suit where her husband is a party. 1 Phil. Evid. (4 Ed.) 87; 1 Greenl. on Evid., sect.

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341. There are two *exceptions* to this rule, made by the statutes of Missouri; *first*, where she has an *interest* in the subject matter of the suit; sect. 4010, Rev. Stat; *second*, when she acts as *agent* of her husband. Sect. 4014, Rev. Stat.

II. Where there is a total failure of proof of the cause of action, as stated in the petition, it is fatal to plaintiff's recovery, for the plaintiff can only recover upon the case as made by the pleadings. *Dougherty v. Matthews*, 35 Mo. 528; *Faukner v. Faukner*, 73 Mo. 327; *Waldhier v. Railroad*, 71 Mo. 514; *Jackson v. Hardin*, 83 Mo. 175.

III. Defendant was a mandatory, and was only liable for a failure to bestow such care as he bestowed on his own property, or for such gross negligence as is inconsistent with good faith. Story on Bailments (9 Ed.) sects. 174, 182; *Wiser v. Chesley*, 53 Mo. 547; 2 Kent's Com. 560.

IV. Agents, as *bailees*, have the right to employ a *sub-agent*, where, from the nature of the undertaking, it must have been contemplated by the principal (bailor), or where there is a custom of employing a sub-agent in the transaction of the business of the agency. Story on Agency (9 Ed.) sect. 201; 1 Parsons on Cont. 83; *Planter's Bk. v. 1st Nat. Bk.*, 75 N. C. 544; *Hall v. Lauderdale*, 46 N. Y. 70. And he is not liable for the default of the sub-agent, unless he participated in it, or acted in bad faith in selecting the substitute. Story on Bailments (9 Ed.) 174; Story on Agency, sect. 217 *a*; *McLean v. Rutherford*, 8 Mo. 109; *McMorris v. Simpson*, 21 Wend. (N. Y.) 610; Erskine's Inst., book three, title three, section 34; Dig. Lib. 17, Tit. 1, L. 8, sect. 3.

V. The statute of limitations begins to run against a cause of action in favor of an estate as soon as an administrator is appointed, and there is a person in being that can sue. *Milan v. Pemberton*, 12 Mo. 599; *Mc-*

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Kinzie v. Hill, 51 Mo. 303; *Ayers, Adm'r, v. Donnell*, 57 Mo. 396; *Tapley's Adm'r v. McPike*, 50 Mo. 589.

VI. Under section 3244, Revised Statutes, a defendant may be deprived of the benefit of the statute of limitations; but when these matters are relied on as answer to the plea of such statute, they should be fully set out, so as to advise the person pleading the statute of the *particular thing* charged to have been done to avoid his plea. And it must be *proven* as *pleaded.* Ignorance of the *facts* which constitute a cause of action is no excuse for not bringing a suit within the time limited by law for bringing such actions. *Moore v. Mining and Smelting Co.*, 80 Mo. 86; *Foley v. Jones*, 52 Mo. 64; *Wells v. Halpin*, 59 Mo. 92; *Smith v. Newby*, 13 Mo. 160.

VII. A general denial is equivalent to the "general issue," at common law, and it is sufficient to put in issue all the facts necessary for a plaintiff to prove in order to recover. *Moorman v. Barton*, 16 Ind. 266; *Perkins v. Emil*, 2 Kan. 355; *Allen v. Richard*, 83 Mo. 55.

VIII. The statute of limitations was sufficiently pleaded in defendant's answer, and the reply admits the sufficiency of the answer. *Birdsey v. Heilner*, 6 Fed. Rep. No. 3, p. 147.

IX. If there is any evidence tending to establish a defence, the trial court is bound to submit the issues to the jury. *Holliday v. Jones*, 59 Mo. 482; *Kelly v. Railroad*, 70 Mo. 604; cited and approved in 79 Mo. 466, and in 80 Mo. 225.

BULER & TIMMONDS, for the respondent.

I. The petition sufficiently alleges the improper conduct of defendant in concealment of the fact that he had collected the money, to avoid the bar of the statute of limitations. Sect. 3244, Rev. Stat.; *Arnold v. Scott*, 2 Mo. 13; *Smith v. Newby*, 13 Mo. 159.

II. There was no error in permitting Mrs. Hoffman to testify. *Frigley v. Cowgill*, 48 Mo. 295; *Sherwood's*

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Adm'r v. Hill, 25 Mo. 392; *Scroggin v. Holland*, 16 Mo. 425; *Cannon v. Moore*, 17 Mo. App. 92; *Robinson v. Talmage*, 97 Mass. 171. But even if erroneous, the admission of her testimony would be no ground of reversal, for she testified to nothing more than was admitted by defendant in his own testimony; and her evidence could not have affected the verdict, and the error, if any, was harmless. *Public School v. Risly*, 40 Mo. 370.

III. Proof that Sutherland received the money for defendant, under the power of attorney introduced in evidence, was sufficient to fix the liability of defendant in this action. Dunlap's Paley's Agency, 292; Story on Agency, sect. 231; *Matthews v. Hayden*, 2 Esp. Cas. 509.

IV. The answer did not aver any facts to relieve defendant from his liability. Hence the question of negligence, or of defendant's duties as a mandatory does not arise in the case, and the authorities cited as to bailments are inapplicable. *Camp, Adm'r, v. Heelen*, 43 Mo. 591; *Northrup v. Insurance Co.*, 47 Mo. 435; *McCormick v. Brush*, 38 Tex. 344.

V. Even if properly pleaded, the facts, as shown in evidence, would have constituted no defence in this action, so far as defendant's original liability on account of the money collected by his attorney in fact is concerned. *Cobb v. Becke*, 6 Q. B. (E. C. L.) Rep. 930; *Montgomery Co. Bk. v. Albany Bk.*, 7 N. Y. 459.

VI. Plaintiff's right of action is not barred by the statute of limitations. *Kane Co. v. Cook*, 8 Cal. 457; *Foley v. Jones*, 52 Mo. 64; *State to use of Judge v. Gatzweiler*, 49 Mo. 28; Angell Lim. 186.

VII. The instructions given by the court presented to the jury the only questions concerning which there was any conflict in the testimony, *and, under the pleadings and evidence*, those asked by defendant were properly refused. *Jaccard v. Anderson*, 37 Mo. 91;

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Barr v. Armstrong, 55 Mo. 588; *Fields v. Railroad*, 80 Mo. 203.

THURMAN & WRAY, in reply.

If defendant had *forgotten* the fact of signing the power of attorney, and, for *that reason*, failed to disclose to plaintiff that fact, it would not constitute an "improper act," under section 3244, Revised Statutes. *Ly' v. Shinnebarger*, 17 Mo. App. 66. And there is not...ng in the record to show that *plaintiff* did not know all the facts.

PHILIPS, P. J.—I. On this record this judgment was manifestly for the wrong party. The plaintiff's cause of action accrued in 1867, whereas this suit was not brought until 1883, more than sixteen years after it might have been instituted. Under the statute it was barred in five years. But plaintiff contends that it is saved by section 3244, Revised Statutes, which provides, that: "If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented."

The reply only alleges that defendant concealed from plaintiff the facts alleged in the petition; that is to say, the defendant concealed from plaintiff the fact that he had received from Adamson certain vouchers, and the fact that defendant had collected the money thereon.

This is nothing more, in substance, than an affirmation that defendant had collected money and that plaintiff was ignorant thereof, as an excuse for not bringing action to recover it within the time limited by the statute of limitations.

It has been the uniform construction of this statute that it was not designed to protect plaintiffs who were simply ignorant of the existence of the facts entitling

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them to bring suit, "unless that ignorance is occasioned or brought about by some improper conduct on the part of the defendant." *Wells v. Halpin*, 59 Mo. 95; *Taylor, Adm'r, v. Newby*, 13 Mo. 159; *Foley v. Jones*, 52 Mo. 64. It is the doing of some improper act, calculated to throw the party plaintiff off his guard, some act of concealment or suppression where the party ought to speak, that suspends the operation of the statute of limitations.

It was not designed to impose upon the debtors the obligation of going to their creditors and offer to confess judgment or acknowledge a liability before they can invoke the statute of limitations.

The evidence in this case shows that plaintiff, as early as 1866, was in possession of the knowledge that the voucher had been issued, and that defendant had placed it in the hands of Bray for collection. The means of information as to whether it had been collected were as accessible to plaintiff as to defendant. A simple inquiry of Bray wouid have enabled plaintiff to learn all about it, and the fact, presumably, that Suthlerland had it. And if not satisfied with the information derived from Bray, a letter to the department at Washington City would have informed him whether or not the money had been paid. The defendant gave him all the information he had, or at least there is not one word in this record to show that defendant had knowingly misstated a single fact to plaintiff. As the plaintiff was advised of defendant's relation to this matter, and of the necessity of a collection at Washington City, the defendant being a mere mandatory without hire, it was not to be expected that he would conduct the collection in person by going to Washington City. In the very nature of the case, and the almost universally known method of making such collections, the plaintiff knew that it had to be conducted by a sub-agent. And when advised of the fact that the voucher had been committed to Bray for such purpose, the plaintiff, by not objecting, acquiesced in the selection. In such case the sub-agent became as

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much the agent of plaintiff as that of defendant; and he could have maintained an action directly against the sub-agent for the money collected going to the estate. Story on Agency, sects. 201, 217 *a*.

It is true the evidence shows that defendant executed to Sutherland a power of attorney, by which he was enabled to make the collection. But the petition is not framed upon any misconduct in this respect, nor does the reply impute any concealment of this fact by defendant as the basis of recovery; and if it had the proof would not have warranted a recovery based thereon.

II. But plaintiff contends that under the general issue the defendant is confined singly to the question: Did he receive the money? And when plaintiff showed that defendant's attorney, Sutherland, had collected the voucher, his case was made. The general denial has no such restricted office in this case. Under it the defendant was entitled to make any proof which included a fact within the terms of the allegations, necessary to support the plaintiff's case. *Northrup et al. v. Insurance Co.*, 47 Mo. 444. Under the general issue the defendant might prove any fact which went to show that plaintiff never had a cause of action against him. *Greenway v. James*, 34 Mo. 328.

Especially was it competent for the defendant, after it became necessary to support plaintiff's case, that he should prove the fact of the power of attorney to Sutherland, and Sutherland's collection, to show, as part of the *res gestae*, how the power of attorney came to be executed, and defendant's ignorance of its existence, and the fact of payment to Sutherland.

As counsel for plaintiff contends, it was not required of him that he should aver in his petition the manner or means of collection by defendant, as that was matter of evidence, and as the defendant cannot be held to anticipate the line of evidence the plaintiff may pursue, he must, *ex necessitate*, be permitted to meet such proof under the general issue. *Lain v. Shepherd-*

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son, 23 Wis. 224; *Mather v. Hutchinson*, 25 Wis. 36; *Taylor v. New England Coal Mining Co.*, 4 Allen 577.

Unless the defendant, at the time of his coversations with the widow and plaintiff, concerning the voucher, knew that he had given the power of attorney to Sutherland, and that Sutherland had collected the money, how was it possible for him to conceal the fact from plaintiff? The statute admits of no such absurdity.

III. It is unnecessary to review the instructions. The court tried the case on a wrong theory. The instructions given entirely ignored the defence of the statute of limitations. An instruction which authorizes a recovery should embrace all the issues, which there is any evidence to support. *Fitzgerald v. Haywood*, 50 Mo. 516; *Raysdown v. Trumbo*, 52 Mo. 35; *Porter v. Harrison*, 52 Mo. 524.

The court should, on another trial, in explicit terms advise the jury, that under the evidence the plaintiff's cause of action is barred, and he cannot recover, unless the plaintiff has satisfied their minds from the evidence that plaintiff, by some improper act of the defendant, was kept in ignorance of the facts, whereby he was prevented from bringing his action until the time he did; and that mere proof of ignorance on the part of plaintiff that the money had been collected by Sutherland, will not warrant the jury in finding the existence of the required improper conduct on defendant's part.

The jury should also be told, that if they find from the evidence that defendant undertook the sale of the horses, and the collection of the voucher as an accommodation to Adamson, and that he gave the voucher to Bray for collection, and informed plaintiff of this fact, and that he executed the power of attorney to Sutherland under the belief that it was to Bray, and in good faith told the plaintiff that Bray had not collected the money, and was ignorant of the fact that Sutherland had collected it, the jury should find for the defendant.

IV. As to the competency of the widow to testify

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in this case, it is enough to say that the rule is fully declared in *Holman v. Bachus* (73 Mo. 49), and *Cannon v. Moore* (17 Mo. App. 92-99).

The judgment of the circuit court is reversed, and the cause is remanded for further proceeding conformably herewith. All concur.

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ARTHUR STORMS, Respondent, v. N. M. WHITE, Appellant.

Kansas City Court of Appeals, June 28, 1886.

1. CATTLE—TAKING UP OF UNDER THE STATUTE—CONSTRUCTION OF SECTION 7333, REVISED STATUTES.—In order to justify the taking up and posting of cattle under the stray law (sect. 7333, Rev. Stat.), it must be pleaded and shown by the evidence, that they had broken over or through a lawful fence; and, without this proof, plaintiff in an action of replevin for the cattle so taken up and posted, was entitled to a judgment on proof of ownership of the cattle.

2. PRACTICE — PLEADINGS — ISSUES — INSTRUCTIONS.— Where instructions present questions outside of the issues tendered by the pleadings, they should be refused. Parties can only try the case presented in their pleadings.

APPEAL from Carroll Circuit Court, HON. JAMES M. DAVIS, Judge.

Affirmed.

The case is stated in the opinion.

HALE & SONS, for the appellant.

I. The refusal of instructions asked by defendant was erroneous. They complied, substantially, with all the requirements of the stray law. Rev. Stat., sects. 7333–7336.

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II. The law presumes that every man has a lawful fence around his field. Since this is the requirement of the law, the burden of proof is not on defendant to show it.

III. The jury were not told to find the value of the property, nor were they told to find defendant's interest in the property. Both of these are necessary. *Mix v. Kepner*, 81 Mo. 96.

IV. The instructions given for plaintiff amounted to a demurrer to the evidence, and took the case away from the jury.

JAS. F. GRAHAM and L. H. WATERS, for the respondent.

I. The court committed no error in giving plaintiff's instructions. When defendant relied upon the provisions of the "stray law" to justify his detention of plaintiff's cattle, he was required to prove such state of facts as would bring him within the statute. The only interest defendant had, or could have had, in the cattle, depended upon the fact, whether they "broke" into his inclosure through a "lawful fence." In *Mix v. Kepner* (81 Mo. 93), "the property was found to be in the possession of plaintiff" while the "title was found to be in defendant;" such, also, was in the case of *Chapman v. Kerr* (80 Mo. 158).

II. Defendant's instructions, except the *first* (which was given), were properly *refused*. There *was no* evidence to warrant them, nor was there any issue under which such evidence could have been introduced.

PHILIPS, P. J,—This is an action of replevin. Petition in the usual form. Under the order issued thereon, the sheriff took and delivered the property to plaintiff. The answer pleaded the general issue, and then pleaded specially that defendant was in possession of the cattle in controversy, and that defendant had taken the cattle up, and held them under the stray law; that said cattle

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had broken into the premises of defendant, inclosed with a lawful fence; whereupon the defendant proceeded to give the notice, as provided by statute, preparatory to posting said animals as strays. The reply tendered the general issue.

The bill of exceptions recites. as stated in appellant's abstract, that: "The evidence on the part of plaintiff tended to prove his ownership of the property in question, and damages to the amount of one hundred dollars, and that defendant owned land on each side of plaintiff's pasture, from which the stock strayed; that the fence between the lands of plaintiff and defendant was not a lawful fence as required by law.

"The evidence offered by defendant tended to prove the allegations in the answer, except as to lawful fence."

The only evidence set out in the abstract, furnished this court, relates to the giving of the notice. Verdict and judgment for plaintiff; from which defendant as appealed.

I. The only errors complained of arise on the action of the court in giving and refusing instructions. The first instruction given for plaintiff, told the jury that if they found from the evidence that the cattle in controversy belonged to the plaintiff, they should find for him, unless they further found from the evidence that they were taken up by defendant on his premises, inclosed with a lawful fence. In which latter event they would find for the plaintiff as to the cattle, and for defendant as to costs of suit.

It may be as well here to observe that it is manifest from this and other instructions given by the court, that the issue was fairly and squarely submitted to the jury as to whether the premises of defendant, where the cattle seemed to be conceded to have been taken up by defendant, were enclosed with a lawful fence. As the jury found the issues for plaintiff, without saying anything in their verdict about the costs, it is manifest that they

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found against the defendant respecting the lawfulness of his fence. So that it is unnecessary to consider the correctness or incorrectness of that part of the instruction concerning the costs.

The second instruction presents the proposition that defendant had no right to take up said cattle on his premises, unless they were inclosed with a lawful fence. This instruction is unobjectionable under the issue tendered by defendant. His sole justification, as pleaded in his answer, is based on section 7333, Revised Statutes, which gave the defendant the right to post the cattle, provided they "shall have broken over or through a lawful fence." As defendant undertook to justify under this statute, it devolved upon him, as the very foundation of his right, to prove that he had a lawful fence. Without this proof, plaintiff was entitled to a judgment on proof of ownership of the cattle.

The only other instruction given for plaintiff, not already covered, is one to the effect, that no demand was necessary in this case before the institution of suit, if defendant wrongfully took possession of the property. We see no objection to this declaration of law, especially when defendant has not pleaded the want of any demand.

II. The instructions refused by the court, as asked by the defendant, were properly refused. They present questions outside of the issues tendered in the answer. One or more, for instance, is predicated upon the existence of a partition fence between plaintiff and defendant being down and in a broken condition, and the plaintiff turning his cattle in the enclosure, to escape through the fence. No such issue is presented in the answer, and if there had been, there is no evidence presented in the record before us to justify or support such an instruction. Parties can only try the case presented in their pleadings.

III. Counsel for defendant make some question as to the court not directing the jury to find the value of

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the cattle separate from the amount of damages for the taking and detention. As the plaintiff was already in possession of his property, and the issue of ownership was found for him, the defendant is not injured by the failure to have a finding as to its value. The jury assessed the damages at twenty-three dollars; and as the evidence showed plaintiff's damage to be one hundred dollars, we cannot see any ground of complaint for which the verdict should be interrupted.

The other judges concurring, the judgment of the circuit court is affirmed.

BESSIE M. COTTRELL, Respondent v. ADOLPH SPIESS, Appellant.

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Kansas City Court of Appeals, June 28, 1886.

1. MARRIED WOMEN—ACQUISITION OF PERSONAL PROPERTY BY—RULE OF THE COMMON LAW.—At common law, the acquisition of personal property, *without more,* enures to the benefit of the husband, but this is where the property came to her by gift, bequest or inheritance, or the like, from *other source than the husband;* and where the husband had done no act of *renunciation* of his marital rights in favor of *her* sole dominion over the property. But, even at common law, the husband may make a gift of personal property to the wife; and the purpose of the husband to create in her a separate ownership may be inferred from her long and uninterrupted control over it, with the acquiescence of the husband.

2. ——— ESTOPPEL IN PAIS—COURSE OF CONDUCT—CASE ADJUDGED. Where a party by his course of dealing, or particular conduct, though not actually designed to entrap or defraud another, but which induces another to believe, as in this case, that the husband is the owner of the property, upon which he obtains credit, *she* will be estopped from asserting the contrary when the creditor demands that the property shall answer for his debt. And in respect of such separate property, about which she may make contracts as

a *feme sole*, and to which she may pass the title by parol and delivery, she has capacity to create an estoppel against her *in pais*, as one *sui juris*. *Rannels v. Gerner*, 80 Mo. 483.

3. ——— EVIDENCE — COMPETENCY OF DECLARATIONS RESPECTING PROPERTY—CASE ADJUDGED.—The general rule is that a party cannot make evidence for himself. But it would be competent, in a controversy like this, as bearing on the question of the wife's assertion of ownership and the acquiescence of the husband therein, to show the acts and conduct of each respecting the property, its custody and management, *prior to the time of creation of an adverse claim*. But, in a case like this, no such acts or declarations of the wife, as occurred *subsequent* to the giving of credit to the husband on the faith of *his* ownership of the property, is competent, unless it be to show that she has acquired the title to the property from some other source, antagonistic to the husband.

4. ——— PRACTICE—INSTRUCTIONS.—Where an instruction submits an issue not warranted by the evidence, a verdict based on such ground should be set aside, and where the trial court should award a *venire de novo*, it ought not to let such issue go to the jury.

APPEAL from Johnson Circuit Court, HON. NOAH M. GIVAN, Judge.

Reversed and remanded.

The case is stated in the opinion.

R. M. ROBERTSON and SAMUEL P. SPARKS, for the appellant.

I. In the absence of proof of the statutes of Nebraska, where the common law was in force, courts will presume the existence of the common law in that state, and that it is the same as that of our own. *White v. Chaney*, 20 Mo. App. 389; *Flats v. Mulhall*, 72 Mo. 522; *Goldsoll v. Chat. Bank*, 80 Mo. 631; *Charlotte v. Chouteau*, 16 Mo. 102. By the common law of this state the acquisitions of the wife inured to the benefit of the husband, by becoming his property *jure marite*, and, of course, liable for his debts. No evidence having been offered to show that the statute law of Nebraska had superseded the common law, the court erred in giving

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plaintiff's instructions on that point, and refusing those of defendant.

II. The husband may create a separate estate in the wife, *as to personalty*, by acts, conduct and words, but they must be unequivocal and the proof clear and satisfactory; but not, as in this case, when the property has been mingled with the husband's and he has acquired credit upon the faith of ownership of it. *McCoy v. Hyatt*, 80 Mo. 130.

III. The doctrine that a married woman may estop herself, by her actions and conduct, as to her separate estate, is well established. *Rannells v. Gerner*, 80 Mo. 474; Bigelow on Estoppel, 443. The plaintiff, in this case, stood by and witnessed in silence her husband purchase an interest in the hotel property, and conduct the business in his own name, obtain credit upon the faith of such ownership, with property, which she *now* asserts, was at the very time her separate property. This she ought not to be permitted to do to the prejudice of creditors. *McCoy v. Hyatt*, *supra; Connolly v. Branstler*, 3 Bush (Ky.) 702.

IV. In the absence of fraud, malice, gross negligence or oppression, the principle of compensation governs the admeasurement of damages, and the court erred in allowing the jury to award exemplary damages. *Engle v. Jones*, 51 Mo. 316; *Seibel v. Simon*, 72 Mo. 526; 1 Suth. Dam. 173; 3 *Ibid*, 367.

V. Declarations of plaintiff, respecting her claim to the property, were clearly inadmissible in any theory of the case, and the court erred in admitting it, and its action was duly excepted to.

S. T. WHITE, for the respondent.

I. A husband may make a valid gift to his wife. The gift to plaintiff by her husband in 1879 was good against his creditors, as to debts contracted after the gift. *McCoy v. Hyatt*, 80 Mo. 130; *State to use, etc., v. Smit*, 20 Mo. App. 50; *Bowen v. McKean*, 82 Mo. 594;

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State ex rel. Goldsoll v. Bank, 80 Mo. 626; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Baugert v. Baugert*, 13 Mo. App. 144; *Bettes v. Magoon*, 85 Mo. 500.

II. Even if the law of Nebraska is presumed to be that the personal property of the wife belongs to the husband, yet, after the property is removed to this state, the husband may donate the same to his wife, and it will become a valid gift under the laws of 1875 *in the absence* of any fraud upon *existing creditors*. And the actions and conduct of the husband and wife in reference to the property, and their mode of treatment of the same, are facts from which the jury may infer the existence of the gift. *Cases cited above.*

III. The action of Spiess in taking a mortgage of plaintiff on the property seized, and receiving from her money that was furnished by her father as a gift to her, and from the sale of her lease, in payment of the mortgage debt, estop *him* from asserting that *she* was not the true owner.

PHILIPS, P. J.—This action grew out of the seizure of personal property under a writ of attachment sued out by defendant against D. H. Cottrell. Plaintiff, who is the wife of said D. H. Cottrell, claimed the goods as her separate property, and sues the defendant in conversion, coupled with the allegation that the defendant was actuated by malice and was guilty of oppression in the matter. The plaintiff recovered judgment, from which defendant prosecutes this appeal.

I. The property in question was employed in a hotel, as furniture, kept in Warrensburg, Johnson county. Plaintiff testified that this property was bought by her with the proceeds of money given her by her husband, and of certain notes, the consideration of which was the purchase money of land sold by her husband, which land belonged to him, but the notes were executed to her, and given her by her husband.

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This occurred in the state of Nebraska prior to their removal to Missouri, perhaps in 1879.

Appellant contends, and asked the trial court to so declare the law, that as there was no proof adduced as to what the statute law of the state of Nebraska was, we must assume that the common law was in force there at the time of the alleged gifts. This may be conceded. *White v. Chaney*, 20 Mo. App. 389. But does it follow, as contended by appellant, that the property so given was not her separate estate, at common law, and became subject to the husband's debts on its transfer to this state?

A reference to the authorities, such as *Meyers v. McCabe*, 73 Mo. 236, and *White v. Chaney*, *supra*, where it was held that the acquisition of personal property by the wife, without more, at common law, enures to the benefit of the husband, will show that they were instances where the property came to her by gift, bequest, or inheritance, or the like, from other source than the husband, and where the husband had done no act of renunciation of his marital rights in favor of her sole dominion over the property.

At common law the husband may make a gift of personal property to the wife. *Welch v. Welch*, 63 Mo. 59. The purpose of the husband to create in her a separate ownership may be inferred from her long and uninterrupted control over it with the acquiescence of the husband. *McCoy v. Hyatt*, 80 Mo. 135. The very fact that the husband, as testified to by the plaintiff, allowed her to take and keep certain money which was paid him in gold in the course of his business, and had the notes for the purchase money to the land, sold in Nebraska, executed to her, if delivered to her and kept by her, were acts indicative of a purpose to create in her a separate estate. And this he had a right to do, if done in good faith, as against subsequent creditors.

II. Among the instructions asked by the defendant and refused by the court are the following:

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"The court instructs the jury that if they should find and believe, from the evidence in the case, that D. H. Cottrell, the husband of plaintiff, falsely assumed and held himself out towards defendant as the owner of the property of which the property in controversy was a part, and that plaintiff knew of her husband's action in this respect and acquiesced therein, and that defendant was thereby deceived and sold him goods and gave him credit therefor on the faith of such ownership, then plaintiff is estopped to deny that said D. H. Cottrell was the owner of such goods, and in such case your verdict should be for defendant."

"The court instructs the jury that if they should find and believe, from the evidence in the case, that the plaintiff, by her actions and conduct or representations, induced the defendant to believe that her husband, D. H. Cottrell, was the owner of the personal property of which the property in controversy was a part, and, upon the faith of such ownership, defendant's extended to him credit, or that said plaintiff knowingly permitted her husband to obtain credit on the faith of such ownership, then she cannot now assert any title or claim to said property which she may have had at such time to the prejudice of defendant, and your verdict should be for defendant."

It is true the court had given an instruction somewhat germain to the principle announced in those refused. But the one given presented the issue of positive fraud, active conduct on the part of plaintiff designed to defraud defendant by inducing him to give the credit. Whereas the refused instructions asserted another well recognized rule of the doctrine of estoppel *in pais:* that where a party, by his course of dealing, or particular conduct, though not actually designed to entrap or defraud another, but which induces another to believe, as in this case, that the husband is the owner of the property, upon which he obtains credit, she will be estopped from asserting the contrary when the creditor demands

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that the property shall answer for his debt. The case of *Chouteau v. Goddin* (39 Mo. 250), is a striking illustration of the application of this wholesome doctrine. Wagner J., expressed the rule thus: "Where a party, by his acts or words, causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous condition, he will be concluded from averring anything to the contrary against the party so altering his condition."

The husband obtained this credit for supplies which went into the hotel where this furniture was employed; and a careful reading of the testimony in this record has persuaded us that there are such strong circumstances of an equitable estoppel in favor of this defendant as should entitle him to the most explicit submission of that issue to the jury.

In respect of such separate property, about which she may make contracts as a *feme sole* (*Dunifer v. Jecko*, Sup. Crt. Mo. 2 West Rep. 452-3), and to which she may pass the title by parol and delivery, I can perceive no reason why she may not be held to have capacity to create an estoppel against her, *in pais*, as one *sui juris*. Sherwood, J., in *Rannels v. Gerner* (80 Mo. 483), seemed to recognize her subjection to such an estoppel, for he says: "Estoppels *in pais* are not applicable to *femes covert*, except where regarded as *femes sole*, in consequence of possessing separate estates."

III. Objection was made by defendant in the progress of the trial to certain acts and statements of the plaintiff introduced in evidence by her in support of her claim of separate estate in this property. Without reciting this evidence, it is enough to say, that the general rule is that a party cannot make evidence for himself. It would be competent, in a controversy like this, as bearing on the question of the plaintiff's assertion of ownership and the acquiescence of the husband therein, to show the acts and conduct of each respecting the property, its custody and management prior to the

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time of creation of an adverse claim. But certainly, in a case like this, no such acts or declarations of the plaintiff as occurred subsequent to the giving of the credit to the husband on the faith of his ownership of the property, is competent, unless it be to show that she has acquired the tittle to the property from some other source antagonistic to the husband. The very issue tendered by the defendant in this case is that this assertion of ownership by plaintiff has been "trumped up" since the creation of this claim against the husband, and was designed to defraud his creditors.

IV. The court gave an instruction authorizing the jury to award "smart money," provided they found that defendant was actuated in the attachment by malice. We do not think the evidence in this case warranted the submission of that issue to the jury. A verdict based on such ground, in view of all the surrounding facts and circumstances, ought to be set aside; and where the trial court should award a *venire de novo* it ought not to let such issue go to the jury.

The judgment of the circuit court is reversed and the cause remanded. All concur.

W. P. SPURGEON, Plaintiff in Error, v. H. K. WEST, ADMINISTRATOR, ETC., OF ANNA MCKEE, Defendant, in Error.

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Kansas City Court of Appeals, June 28, 1886.

CASE ADJUDGED.—The record fails to show that plaintiff excepted to any action of the court, at the trial, in giving or refusing instructions. Without taking such exceptions this court cannot review the instructions. And the action, being one at law, triable before a jury, questions of law can only be raised at the trial by instructions.

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ERROR to Linn Circuit Court, HON. G. D. BURGESS, Judge.

Affirmed.

O. F. LIBBY, W. H. BROWNLEE, for the plaintiff in error.

H. K. WEST and A. W. MULLINS, for the defendant in error.

I. It does not appear that any exception was taken or saved to any ruling or order of the trial court in this case. There is, therefore, no question presented for decision. Rule fifteen of this court; *St. Joseph v. Enworth*, 65 Mo. 628; *Jackson v. Railroad*, 80 Mo. 147; *Bradley, etc., Mfg. Co. v. Bean*, 20 Mo. App. 111.

PHILIPS, P. J.—The errors complained of by plaintiff in error are such as arose in the progress of the trial, in giving a certain instruction at the request of defendant, and refusing instructions requested by plaintiff. The record, as furnished this court by plaintiff in his abstract, fails to show that he excepted to any action of the court, at the trial, in giving or refusing instructions. Without taking such exceptions we cannot review the instructions. And the action, being one at law, triable before a jury, questions of law can only be raised at the trial by instructions. This has been so repeatedly decided by the supreme and appellate courts that it is unnecessary to cite cases.

Plaintiff in error recognizing the fact that the abstract of the record, furnished by him, failed to comply with the rule of this court, sought, after the time had expired, to remedy this omission by offering to file here a full abstract. This offer was refused. But, on looking at this additional abstract, which we are to assume is full, inasmuch as plaintiff's attention had been di-

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rected to the importance of this matter, we discover the same defect in the record, a failure on the part of plaintiff to save any exception to the action of the court, in giving or refusing instructions.

The judgment of the circuit court is affirmed. All concur.

WILLIAM LOWE, Defendant in Error, v. M. HENRY SMITH, Plaintiff in Error.

Kansas City Court of Appeals, June 28, 1886.

1. JUDGMENT—MOTION FOR SATISFACTION—CONCLUSIVENESS OF AS TO PARTIES—CASE ADJUDGED.—Where, in an action of replevin, judgment was rendered for the defendant for the value of the property, this was a solemn adjudication that the damages awarded to defendant were owing and belonged to him. A motion at law, for satisfaction of such judgment, as in this case, on the ground that another party was equally interested in it, and had a right to collect it, is inconsistent with the judgment, and should be denied.

2. ——— INTEREST IN JUDGMENT—CHARACTER OF PROCEEDINGS ASSERTING IT.—Even if such interest in a judgment exists in fact, as by virtue of being a partner with the party recovering it, the *methods* resorted to in this proceeding are not admissible. After the collection of judgment there might be an equitable proceeding, as for an adjustment of partnership accounts. But no such equitable matters are cognizable under a motion like this, on the law side of the court.

APPEAL from Johnson Circuit Court, HON. NOAH M. GIVAN, Judge.

Reversed and remanded with directions:

Statement of case by the court.

This is a proceeding by motion to have an execution returned satisfied. In 1880 there was pending in the circuit court of Johnson county an action of replevin wherein

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the defendant in error, William Lowe, was plaintiff, and plaintiff in error, M. Henry Smith, was defendant, for the recovery of certain goods. The plaintiff Lowe having failed to prosecute his said action with effect, judgment was rendered therein in favor of defendant Smith for the value of the property, assessed at the sum of $254.10, and for costs. In January, 1882, execution issued on said judgment, returnable to the February term of said circuit court following. On the return day Lowe filed his motion to have said execution returned satisfied, on the ground that the same had been fully paid. On the hearing of this motion the following facts, in substance, were developed: One Morgan and said Smith, prior to the dates aforesaid, had formed a co-partnership for the purpose of selling goods at the town of Warrensburg, in Johnson county. Morgan put in so many goods, then on hand, and Smith furnished so much cash capital. Morgan afterwards attempted to give the plaintiff Lowe a mortgage on these goods, out of which grew the replevin suit above named.

When the execution in question came to the hands of the sheriff, Lowe wanted him to stay the levy thereof, and, in order to indemnify the sheriff, gave him a check for the amount of the judgment, but on written stipulation that the sheriff was to hold the same until the determination of the motion herein. On rendition of the judgment aforesaid, Lowe and Morgan got together, and, under the claim that Morgan was a partner of Smith's and interested in said judgment as partner, Lowe gave his check payable to Morgan for the amount of the judgment, which was assigned over at once to Lowe's attorney, to be held by him subject to the determination of this motion. While Lowe and Morgan testified that the check could be collected at any time, yet the fact is quite apparent, from all the circumstances and evidence, that Lowe claimed that Morgan was owing him, and that this arrangement was to settle the debt between them, if Lowe succeeded in this motion, and, further, that

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Morgan was joining Lowe in this matter to prevent the money from going into Smith's hand unless Smith would come to terms with Morgan touching the settlement of the partnership affairs.

The court sustained the motion, and the sheriff, in accordance with the action of the court, returned the execution satisfied.

Smith prosecutes this writ of error to reverse the action of the circuit court.

SAMUEL P. SPARKS, for the plaintiff in error.

I. The whole proceeding was anomalous. The matters adjudicated were purely of equitable cognizance and could not be determined in a motion at law. *Holden v. Vaughan*, 64 Mo. 588; *Phillips v. Nimrick*, 64 Mo. 17; *Hull v. Sherwood*, 59 Mo. 172. The purpose of the motion was to secure the specific performance of a particular act, which could only be administered in equity. 1 Story on Equitable Jurisprudence, section 716.

II. The evidence offered to impeach the judgment, by showing that it was not the individual judgment of Smith, was improperly admitted. This could only have been done in a proper case, by a direct proceeding. *Dilworth v. Rice*, 48 Mo. 124; *Mervine v. Parker*, 18 Ala. 241; Freeman on Judgments, sect. 290.

III. The attempt of Morgan to satisfy the execution was nothing more than an application of a partnership debt to the payment of his individual debt to Lowe. This *could not be* done without the consent of Smith. Story on Part., sect. 132; 3 Kent's Com. 42; *Flanagan v. Alexander*, 50 Mo. 50; *Ackley v. Stacklin*, 56 Mo. 558; *Hilliker v. Francisco*, 65 Mo. 598; *Forney v. Adams*, 74 Mo. 138.

IV. The agreement, which the sheriff Shaw entered into with Lowe, respecting the check, was unlawful. He had but *one duty;* obey the writ by collecting the money.

V. Where one partner, in fraud of his co-partners,

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and in collusion with the defendant, executes a release for the purpose of preventing them from enforcing a just demand, the defendant will not be allowed to plead this release as a defence to an action against him. 1 Lindley on Part. (1 Y. &. J. 362); *Canal Co. v. Gordon*, 6 Wall. (U. S.) 561.

O. L. HOUTS, for the defendant in error.

I. The court, sitting as a trier of fact, in an action at law, found the issues for defendant in error, and this court will not disturb the finding. And as no declarations of law were asked, *there is nothing to review*. *Easley v. Elliott*, 43 Mo. 289; *Harrison v. Bartlett*, 51 Mo. 170.

II. There was no attempt to impeach the judgment, or show that Smith had no interest in it; but the evidence was for the purpose of showing that Morgan was a partner of Smith and had an interest in the judgment; and authorized to receive payment that would operate as a release. Freeman on Judgments. (Ed. 1873) sects. 462, 175; *Strong v. Phœnix Ins. Co.*, 62 Mo. 295.

III. Partners stand in the relation of co-obligees, and one obligee cannot sue without joinder of his co-obligee as plaintiffs. And one of them could release the whole demand, after suit as well as before. *Henry v. Mt. Pleasant Township, Bates Co.*, 70 Mo. 500; *Ryan v. Riddle*, 78 Mo. 521.

IV. The finding of the court is conclusive that the receipt of payment and release, by Morgan, was not an application of partnership funds for the payment of an individual indebtedness from Morgan to Lowe. And payment by check or note will operate as a satisfaction of a judgment. Freeman on Judgments (Ed. 1873) sect. 463; *Weston v. Clark*, 37 Mo. 568.

V. The nature of the proceeding is the proper one under the circumstances. Plaintiff in error appeared to the action and is bound by the determination thereof.

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Courts always have control of their process to prevent injustice.

PHILIPS, P. J.—The bare statement of this case condemns the action of the lower court. We can discover neither precedent nor authority to support it. The judgment on which the execution issued was a solemn adjudication, by a court of competent jurisdiction, that the damages awarded Smith were owing and belonged to him. A motion, at law, for satisfaction of this judgment, on the ground that another party was equally interested in it, and had a right to collect it, is inconsistent with the judgment, and should have been denied. Freeman on Judgments, section 290. As said by Parsons, J., in *Mervine v. Parker* (18 Ala. 241–2): "The recovery of a judgment is equally conclusive against the defendant that the money is legally due to the plaintiff, and not to another, and if the defendant assumes to pay it to a third person, upon the idea that such third person is beneficially entitled to receive it, he acts at his peril, and, at law, he cannot claim to be credited with such payments, in opposition to the legal rights of the plaintiff, even if equity would afford him relief."

Respondent cites Freeman on Judgments (section 462), in support of the proposition that it is the duty of a defendant in execution, when he becomes advised of the fact that the judgment was rendered for the use of another, other than the plaintiff, he should make payment to the real party in interest. An examination of the adjudicated cases, cited in support of the text, would have satisfied counsel that the principle announced has no application to the facts of this case.

Neither the record nor the fact *in pais* show that this judgment was rendered to the use of Morgan. On the contrary, Morgan was a witness on the trial of the issue in the replevin suit, in antagonism to the defendant Smith, and testified that the goods in fact be-

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longed to Lowe. And now, after Smith has prevailed in that contention, for Morgan to interfere and undertake to claim the right to satisfy Smith's judgment, on the ground that the recovery was for his joint benefit, is as contradictory in law as it is reprehensible in morals.

If, in fact, Morgan has such interest, as he claims, by virtue of being a partner of Smith's, the methods resorted to in this proceeding are not admissible. He could, after collection of the judgment by Smith, have had an accounting in an equitable proceeding, as for an adjustment of partnership accounts. No such equitable matters are cognizable under a motion, like this, on the law side of the court. *Holden v. Vaughan et al.*, 64 Mo. 588. Indeed, the fact is most palpable on the face of this whole proceeding that it was a play of jugglery to coerce Smith into a settlement of the partnership affairs between him and Morgan, and to enable Lowe to get rid of Smith's judgment against him by settling a claim he held against Morgan individually. The sheriff is deserving of censure for lending himself to any such patent scheme.

The judgment of the circuit court is reversed, and cause is remanded with with directions to the circuit court to deny the motion of Lowe, and to set aside the return of the sheriff showing satisfaction of the judgment. All concur.

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PETER G. WILSON, Respondent, v. THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 28, 1886.

1. CONTRACT OF SHIPMENT—CAR DESIGNATED BY COMPANY—MISTAKE—CASE ADJUDGED.—Where, as in this case, the plaintiff took the specific car designated by defendant's agent, the matter of the *number* of the car concerned the carrier alone. This is not affected by the fact that the contract of shipment was reduced to writing, and a car designated in it different from the one so designated by said agent. The contract was to carry the freight, and the number of the car on the margin was nothing more than the *memorandum* of defendant for its assistance and convenience.

2. ——— CLAUSE AS TO NOTICE NOT APPLICABLE—CASE ADJUDGED. In view of the facts of this case, the clause as to *notice* of claim is not applicable. It provides that no claim shall be paid, etc., unless a claim for such loss shall be made in writing, etc., within five days "from the time said stock is removed from said car." The five days, within which notice is to be given, only begin to run from the time the hogs were removed from the car. Neither plaintiff, nor his consignee had an opportunity to remove the hogs from the car, and the complaint is that they were *not delivered* to the consignee by defendant, as it had contracted to do. Certainly the notice would not apply until the defendant, who made the mistake and the wrong delivery, has notified the shipper, or his consignee, of the fact, and that the hogs had been removed from the car.

APPEAL from Carroll Circuit Court, HON. JAMES M. DAVIS, Judge.

Affirmed.

Statement of case by the court.

This is an action to recover damages for failure of defendant, a railroad corporation, to carry hogs of the plaintiff according to contract. The petition charged that the defendant, in March, 1882, agreed with plaintiff to ship a car load of hogs for him from Norborne, Carroll county, to East St. Louis, over its road, consigned to

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plaintiff's agent at said destination. That defendant failed to so do, but instead, delivered to plaintiff's said agent another car load of hogs of an inferior quality, and of less value by two hundred dollars, all of which facts were unknown to plaintiff until after said hogs had been sold and disposed of.

The answer pleaded specially, after tendering the general issue as to other matters, a special contract of shipment, sufficiently noted in the opinion hereafter, which provided that plaintiff should look after loading and unloading his hogs in the car, and have the care of them while in transit, and stipulating that in case of damage growing out of the contract, plaintiff should give to defendant a written notice, sworn to, of the claim for damage or loss within five days after the hogs were removed from the car. It alleged that the fault, if any, in loading the hogs into the wrong car was that of the plaintiff, and that he had failed to deliver to defendant the required notice within the five days.

The reply admitted that plaintiff had not given the notice within five days, and alleged that he did not have notice until after the time had elapsed of the mistake made by defendant, and as soon as the mistake was discovered plaintiff's said agent at St. Louis made demand of payment, and defendant promised to settle the same without objection to the time or manner of demand.

Plaintiff's evidence tended to show that he applied to defendant's station agent at Norborne for a car in which to ship sixty-five head of fat hogs to East St. Louis; that about dark, or a little after, the agent pointed out to him a car standing on its track at said station, and told him to load his hogs into it. Another party, Findley & McQuiston, were shipping hogs at the same time from this station. There were five cars on the track. McQuiston & Co. loaded in the front four cars, and the car in which the agent directed the plaintiff to load was the rearmost car. That plaintiff did load his hogs into the car so designated by the agent, and the hogs so left the

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station, and were carried off in said car. The plaintiff saw, or his servants saw, no number on the car. After completing the loading, the agent presented to plaintiff, or his agent, a contract of shipment to sign, which he did.

The consignment and bill of lading were made out to Metcalfe, Moore & Co., of St. Louis. More than five days thereafter, on receipt of returns from the consignee, the plaintiff discovered, from the lack of correspondence with the number of hogs he had shipped, and from the amount of sale, that there must be some mistake about the matter. He went to St. Louis, and on investigation became satisfied that his car load of hogs had not been properly consigned, and had not been received by his commission merchants. His evidence tended to show that the hogs sent by defendant to his merchant were part of those shipped by Finley & McQuiston. Failing to get any satisfaction from Findley & Co., or to obtain settlement from defendant, this action was brought. Defendant's evidence tended to show that the car pointed out by the agent at Norborne to plaintiff in which to ship was car nubered 3108, and it was the same car in which plaintiff loaded his hogs, and that this car went through to St. Louis without any change, and was duly delivered to Metcalfe, Moore & Co. That plaintiff loaded the hogs himself, or by his servants.

The plaintiff asked no instructions. The court gave quite a number, requested by defendant, and refused others. The court (sitting as a jury) found for plaintiff, and entered up judgment for two hundred dollars against defendant, from which defendant prosecutes this appeal.

GEO. S. GROVER, for the appellant.

I. The defendant was entitled to a judgment upon the pleadings. Rev. Stat., sects. 3524, 3525; *Ennis v. Hogan*, 47 Mo. 513.

II. The plaintiff was not entitled to recover in this action, as the mistake in loading the hogs was a risk,

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which, by the terms of the contract, he expressly assumed. *Atchison v. Railroad*, 80 Mo. 213; *Newby v. Railroad*, 19 Mo. App. 391.

III. The instructions asked by defendant on the question of *notice* correctly declared the law, and it was error to refuse them. *Dawson v. Railroad*, 76 Mo. 514; *Brown v. Railroad*, 18 Mo. App. 568.

IV. The tenth instruction, asked by defendant, should have been given. Authorities cited, *supra*.

SEBREE and HALE & SONS, for the respondent.

I. The answer contained *new matter*, and plaintiff filed a reply thereto. Defendant was not entitled to judgment on the pleadings. Rev. Stat., sect. 3524; *Mortland v. Hatton*, 44 Mo. 58; *Nichols v. Looken*, 79 Mo. 272.

II. The risk of loading was not comprehended in the contract in this case, and *Atchison v. Railroad* (80 Mo. 213), has no application to this case. So the other authorities cited are in plaintiff's favor.

III. The claim as *notice* of loss is not applicable here. There is no evidence that these hogs were ever unloaded to plaintiff's consignees. Plaintiff was not aware of his loss until after five days. The *negligence* of defendant made it impossible to give the five days' notice.

IV. The instructions of defendant were properly refused, because ignoring the right to recover for *negligence independent* of the contract, and of *waiver* of, and excuses for notice of, claim.

V. The tenth instruction was on the basis of transporting the hogs in a certain car, whereas the evidence was (and the court so found), that defendant agreed to transport the hogs in another and different car. It, with the others, ignored the question of negligence.

VI. The finding of the facts by the court has all the conclusiveness of a verdict by the jury.

PHILIPS, P. J.—It is difficult to escape the conclu-

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sion, from all the facts and circumstances in evidence, that the misfortune to plaintiff in this transaction grew out of the mistake of defendant's agent at Norborne in billing the wrong car to Metcalf, Moore & Co. The agent pointed out the car to the shipper and directed him to load his hogs into it. This was done under circumstances to leave no reasonable ground to question the fact, as there is no pretext for saying there was any change of the hogs from one car to another after they were loaded. They all agreed in the fact that the car so pointed out to plaintiff was the rearmost car on the track, and the plaintiff loaded his hogs into it. They were sixty-five in number, and of such a grade as to be easily distinguished from the other hogs shipped at the same time from the station. It was about, or a little after, dark when the car was loaded. Plaintiff very naturally gave no heed to the number. He had nothing to do with the numbering of the car. He took the specific car designated by defendant's agent. The matter of the number concerned the carrier alone. It enabled it to keep its account of the car, so as to trace it, and to guide in the delivery of the freight, and to enable its agents at the point of delivery to identify it.

I. Defendant presented his case in the refused instructions, and in argument at this hearing, upon the assumption that the contract of shipment, having been reduced to writing, and the car furnished by it being designated in the written instrument, it can only be bound by the letter of the written compact, which only required it to deliver that particular car.

The contract, in our opinion, is not so limited. Its stipulation is, "that the party of the first part (the defendant) will * * * forward for the party of the second part (the plaintiff), * * * men and the following freight, to-wit: 1 car hogs (65) from Norborne to U. depot," etc. From which it is plain that defendant's undertaking was to carry sixty-five hogs for plaintiff from Norborne to the Union depot in St. Louis. Nothing is said in the

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contract about the number of the car. On the margin of the contract there is this memorandum: "No. of car 3108." This, as already suggested, was nothing more than the memorandum of defendant for its assistance and convenience.

It would not be contended, I apprehend, by the learned counsel for appellant, that, notwithstanding this marginal note, the defendant could not have shipped the hogs in any other car, and that plaintiff could have claimed damages unless for other cause than the mere change of car designated on the margin of the contract.

In view of the instructions conceded by the court to defendant, it had the full benefit of the issue of fact as to whether car number 3108 was the one pointed out by its agent to plaintiff. By their verdict the jury found that the agent was mistaken, and the verdict is well supported by the evidence.

II. The loss resulting to plaintiff was, therefore, directly traceable and attributable to the act of negligence of defendant's agent, for which it must respond in damages, unless relieved therefrom by some other controlling provision of the contract. To this end defendant relies upon the clause respecting the notice to be given in five days. We are of opinion that this provision is inapplicable to the facts of this case. This provision is, that no claim for damage which may accrue to the plaintiff under the contract shall be paid, etc., unless a claim for such loss or damage shall be made in writing, etc., within five days "from the time said stock is *removed from said cars*."

Waiving any discussion of the question, as to the right of defendant to insist upon this provision, even if applicable to the case, where it knew, from the bill of lading, that plaintiff was shipping to commission merchants in St. Louis, who would be governed in receiving the hogs by the bill of lading, and that plaintiff, in the usual course of such transactions, would not know of the miscarriage until the lapse of the five days after the

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arrival of the hogs, it is enough to say, that the contract invoked by defendant only provides that the five days within which notice is to be given, shall begin to run from the time the hogs were removed from the car. Neither the plaintiff, nor his consignee, had an opportunity to remove the hogs from the car. Complaint is that they were not delivered. Plaintiff never did remove them from the car, and the record furnished us by appellant does not show when plaintiff's hogs were so removed.

The case, in principle, is the same as if the defendant had carried plaintiff's hogs to New York. The five days' notice could not apply to such a case. Especially must this be so, until the defendant, who made the mistake and the wrong delivery, has notified the shipper, or his consignee, of the fact, and that the hogs had been removed from the car.

Seeking, as the defendant does, to escape his common law liability, by invoking the strict letter of its special contract, it must be held both to its spirit and letter.

The other judges concurring, the judgment of the circuit court is affirmed.

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R. S. JUDD, Respondent, v. THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 28, 1886.

1. PRACTICE — ORDINANCE ADMISSIBLE, THOUGH NOT SPECIFICALLY PLEADED.—Notwithstanding an ordinance of a municipal corporation is not specifically pleaded, it is admissible in evidence as bearing on the question of *negligence*, but not in actions *founded on the ordinance* as giving the right of action. But there is no reason for the distinction that the rule is different in different *forums*, as, for instance, that it is applicable to cases *originating* in a justice's court, and not to such as are *brought* in the circuit court.

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2. ——— INSTRUCTIONS—PARTICULAR EVIDENCE.—The singling out, in an instruction, of any particular piece of evidence, has been repeatedly condemned by the appellate courts of this state, as calculated to mislead and unduly influence the jury.

3. NEGLIGENCE—WHEN THERE IS LIABILITY, BECAUSE OF—CASE ADJUDGED.—Where the animal, as here, suddenly comes upon the track of a railroad, at a point where defendant is not required to fence its road, and not at a public crossing, no negligence is imputable to the servants of defendant in managing the train, until after the animal was so entered upon the track in front of the engine. *Sloop v. Railroad, ante*, p. 598. And unless it appears that those in charge of the train could, *after* discovering the animal in front of the engine, by reasonable exertion, have checked the train, having regard to the safety of the cars and passengers, in time to have avoided the collision: there could be no recovery on the ground of negligence.

APPEAL from Carroll Circuit Court, HON. JAMES M. DAVIS, Judge.

Reversed and remanded.

Statement of case by the court.

This is an action begun in the Carroll circuit court against the defendant, a railroad corporation, to recover damages for the injury to two horses, a buggy and harness, the property of plaintiff.

The petition alleges that the accident occurred in the town of Norborne, a municipal corporation, in Carroll county. The injury is alleged to have resulted from the negligence and carelessness of defendant's servants in charge of one of its passenger trains, in running the train against said horses and buggy; with the further averment that the train was running at a rate of speed in excess of four miles an hour, in violation of an ordinance of said town.

The answer admitted the injury to one of the horses, and tendered the general issue as to the other allegations of the petition.

The answer then pleaded, that on occasions of the injury, on the evening or night of November, 1884, there

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was a large gathering of people in said town, drawn hither to receive the news of the result of the national and state elections then held. That the plaintiff came into town for such purpose, and hitched his horses, attached to his buggy, to an insecure post; and that the firing of anvils or guns, and the great excitement incident to the occasion and place, frightened said horses, and caused them to break loose, and run onto the track of defendant in front of the train, where the injury occurred, without any fault or ability on the part of its servants in charge of its train to avert the collision.

There is no substantial disagreement in essentials between the testimony of witnesses in this case. The evidence shows that the plaintiff drove his team into Norborne that evening and hitched it, as he supposed, securely to a post. He and wife had come in to meet their son who was to arrive at this station on the train in question. The train came in a little late, about dark. It halted at the depot, and after plaintiff had met his son, and turned to go to his team, the anvils, in clebration of the results of the election, began firing. Apprehending trouble, he hastened to where he had left his team, and found it gone. The post to which they were attached, was broken off, and carried away by the frightened horses. They ran towards the railroad track, just as the train pulled out from the depot, and, rushing across the track in front of the cars, passed northward; and, instead of going on, the horses suddenly circled around, and, passing in front of the cars, were struck, or, at least, one of them, and killed. The other was found near the track, and its leg torn. Whether this injury to the latter horse was occasioned by the train, or the hitching post, which he dragged after him, is not clear. This horse afterwards died, or was killed to end his suffering. The evidence showed that the train was running at the rate of about six or eight miles an hour. The evidence also tended to show that it would require about seventy or more feet in

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which to bring to a stop a train running at that speed, and that it would require about the same time in which to stop one running at four miles per hour. There was no evidence, of a tangible character, on the part of the plaintiff, to show that the engineer failed to use every available effort to check his train after discovering the last attempt of the team to re-cross his track. The engineer testified, without contradiction, that the team when it first appeared, crossed clear of the track, running north, and he supposed it had gone on, but, suddenly, it reappeared and ran immediately in front of his engine, and, despite the fact that all the available means at his command were put forth to avoid the injury, after he discovered the danger, the horse was struck.

The jury returned a verdict for plaintiff for the value of the horses, and the injury to buggy and harness. Defendant has appealed.

GEO. S. GROVER, for the appellant.

I. This action having been commenced in the *circuit court*, the ordinance relied upon should have been pleaded by its title, or the date of its passage, or the subject matter set out in the petition. Not having been thus pleaded, it was error to permit plaintiff to introduce it in evidence, and to make its violation the basis of a recovery. *Cox v. St. Louis*, 11 Mo. 432; *State v. Odle*, 42 Mo. 210; *Apitz v. Railroad*, 17 Mo. App. 419.

II. The organization of the town of Norborne being a matter of record, oral testimony concerning such organization was inadmissible. Rev. Stat., sects. 4385, 4932, 4933; *Volger v. Heidel*, 60 Mo. 284; *Mabley v. Nave*, 67 Mo. 546; *City of Hopkins v. Railroad*, 79 Mo. 98.

III. As no negligence in the management of the train was shown, the jury should have been instructed to find for defendant. *Wallace v. Railroad*, 74 Mo. 594; *Lord v. Railroad*, 82 Mo. 139; *Harlan v. Railroad*, 17

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Mo. App. 483; *Welch v. Railroad*, 20 Mo. App. 417; *Railroad v. Rice*, 71 Ill. 567.

IV. The instructions given for the plaintiff were not based upon the evidence, and were misleading and prejudicial. *Turner v. Railroad*, 51 Mo. 501; *Ragsdon v. Trumbo*, 52 Mo. 35; *Lester v. Railroad*, 60 Mo. 265; *Bell v. H. & St. J. Ry.*, — Mo. —.

V. The instructions asked by defendant and refused by the court, properly declared the law. Authorities cited, *supra*.

HALE & SONS and SEBREE, for the respondent.

I. The petition charges, *generally*, that the animals were killed by *negligence* of the servants of defendant, and superadding thereto a *special* allegation of negligence, to-wit: that the train was running in violation of a town ordinance, was good pleading. *Mac v. Railroad*, 77 Mo. 224. Plaintiff would have had the right to rely *solely* on the violation of the ordinance and other general acts of negligence for recovery.

II. Defendant's *first* instruction refused, numbered *two*, was properly refused, because there was evidence *tending* to show negligence and sufficient to go to the jury. So as to the one numbered *three*, it is absurd and misleading, and was the converse of the *first* instruction given for it and embodied the same idea. So as to one numbered *four*, it singles out certain parts of the testimony, and is a commentary on the evidence. So as to that numbered *six*, because there was no fact in evidence that would authorize the court to declare said ordinance void, as a matter of law; and so, for the same reasons, the *seventh* instruction.

III. The *substance* of the ordinance was sufficiently set out, and defendant was fully apprised of the nature of his defence arising on said ordinance. This suit is not founded *solely* on said ordinance, but the violation of it is simply alleged as an element of negligence.

IV. As to the organization of the town, defendant

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only objected *generally* to the evidence by *parol.* In the absence of defendant specifying its reasons for objecting to parol proof, the evidence was competent. *Buckley v. Knapp*, 48 Mo. 153; Dill. Mun. Corp. (10 Ed.) 97.

V. Defendant did not make any *affidavit* that they were misled or surprised. *Turner v. Railroad*, 51 Mo. 501; *Lester v. Railroad*, 80 Mo. 205.

VI. On the whole case the law was correctly declared.

PHILIPS, P. J.—I. The sole issues in this case were, first, was there any culpable act of negligence on the part of the servants of defendant in charge of the train? and, second, was there any necessary or reasonable connection between the negligent act and the injury?

The principal act of negligence relied on by plaintiff is the fact that defendant, at the time of the collision, was running its train at a greater rate of speed than four miles an hour, in violation of an ordinance of the town of Norborne. Such an ordinance was offered and read in evidence by plaintiff, over the objection of defendant. The ground of this objection is, that the ordinance was not sufficiently pleaded in the petition to admit it in evidence.

In *Robertson v. Wabash, etc., Ry. Co.* (84 Mo. 121), it is held that, notwithstanding such ordinance is not specifically pleaded, it is admissible in evidence, as bearing on the question of negligence. This ruling we have followed in *Riley v. Railroad* (18 Mo. App. 385), and *Nutter v. Railroad* (*ante*, p. 328).

It is suggested by defendant's counsel that all these decisions were predicated of actions originating in a justice's court, where no formal pleadings are required; whereas, this action was brought in the circuit court, where the cause of action, or rather the facts constituting it, must be fully set forth. We are referred in support of this position to the following adjudications: *Cox v.*

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City of St. Louis, 11 Mo. 432; *Mooney v. Kennet*, 19 Mo. 551; *State v. Odle*, 42 Mo. 210.

It is to be observed, however, that in all of these cases, the action was founded on the ordinance, as giving the right of action. This is the distinction noted by Martin, C., who delivered the opinion in *Robertson v. Railroad*, *supra.* I am unable to perceive any reason for the distinction suggested as to the different forums in which the action may be brought, when the ordinance is offered in evidence, not for the purpose of giving a cause of action based thereon, but merely as evidence tending to support the general allegation of negligence.

The allegation made in this petition, that the rate of speed was in excess of that prescribed by an ordinance of the city, was sufficient to admit the proof, not as conclusive of the fact of negligence, but only, as said by Martin, C., *supra*, as "a fact bearing upon the conduct of the managers of the train, and whether defendant was guilty of negligence at the time and place, resulting in loss to the plaintiff."

Defendant also assigns for error, the action of the court in admitting parol testimony of the existence of the municipal organization of the town of Norborne, It is sufficient to say, that the defendant made no specific objection, at the time, to the introduction of this evidence. His objections were too general. *Johnson & Collins v. Railroad*, *ante*, p. 597.

II. As the action was not founded on the ordinance, the instructions of the court predicated on the existence of the ordinance, and especially directing the attention of the jury to it as a fact in the case, were erroneous. This stood as any other fact in evidence bearing upon the question of negligence. The singling out in an instruction of any particular piece of evidence, as was done in this case, has been repeatedly condemned by the appellate courts of this state, as calculated to mislead and unduly influence the jury.

III. The third instruction, given on behalf of plain-

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tiff, told the jury, *inter alia*, that "if said team came and were upon said track of defendant in such a manner that it could have been seen by those in charge of defendant's engine, that those in charge of said engine could see, and by the use of ordinary care might have seen and known that said team was entangled or fastened upon said track, and under the control of no one, and if those in charge of said engine negligently ran the same upon and over said horses and carriage, then the plaintiff is entitled to recover." This instruction should not have been given in this form. There was no evidence so far as disclosed by the record before us, to support the inference that the "team was entangled or fastened upon said track."

The only foundation for such an assumption can be found in the deposition of the witness Beard, introduced by plaintiff for the purpose of contradicting the witness McCormack, who testified in behalf of defendant. No mere opinion, or statement, outside of court, of a section hand, could bind or affect the defendant. There was scarcely any foundation laid for the contradiction, and if there had been, the testimony was admissible only for the purpose of impairing the testimony of the witness McCormack. It was not proof of the existence of the fact.

This instruction, in common with others given on behalf of the plaintiff, is furthermore faulty in employing the language: "if the engineer, by the use of ordinary care, might have seen and known that said team was entangled," etc. As applied to the facts of this case, such an instruction should not be given. Where the animal, as here, suddenly comes upon the track, at a point where defendant was not required to fence its road, and not at any public crossing, no negligence is imputable to the servants of defendant in managing the train until after the animal has so entered upon the track in front of the engine. *Sloop v. Railroad*, 22 Mo. App. 593, and *Flannery v. Railroad*, *post*, p. —.

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IV. It is a fruitless contention against the irreversible logic of established facts to attempt to predicate a right of recovery in this case on the hypothesis that the engineer should have anticipated danger from a return of the horses to his track after they first crossed. All the facts and circumstances tended to show that the horses had become terribly alarmed at the firing of the anvils, and they ran rapidly to and over the track just as the train was leaving the station. The engineer very naturally would suppose that after the team had crossed his track going north it would pursue its course, with or without a driver. He had no reason to apprehend that the horses would perform so eccentric a movement as to turn from their course and circle around almost immediately in his front. All that reason and common sense could exact of the engineer, under such circumstances, would be to require him to do what he could, after discovering the perilous situation, to avoid the collision, having supreme regard to the safety of his train and of the passengers committed to his care. Had the train been running at the rate of speed prescribed by the ordinance, there is nothing in this record to warrant the inference that it was possible for the engineer to check up in time to have avoided the accident.

V. Without undertaking to review, in detail, the instructions, we will say that, in the event of a further trial, the court should instruct the jury, that, under the facts and circumstances in evidence, no negligence, contributing to this injury, is imputable to the engineer and servants of defendant in charge of the train, prior to the time they discovered the horses attempting to cross, or on, the track in front of the engine; and, unless the jury find from the evidence, that those in charge of the train could, after thus discovering the horses in front of the engine, by reasonable exertion, have checked the train, having regard to the safety of the cars and passengers, in time to have avoided the collision, they should find for the defendant. This is the real issue in this case, and

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without the requisite proof of negligence on the part of the engineer, as above indicated, the court should direct a verdict for the defendant.

In view of the fact that defendant had no sort of agency in frightening the horses, in the first instance, and sending them in the path of danger, the plaintiff should be held to make out his case against the defendant.

The judgment of the circuit court, the other judges concurring, is reversed, and the cause remanded.

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CHARLES H. GILBERT, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 28, 1886.

DAMAGES—FAILURE OF PROOF— CASE ADJUDGED.—Where the proof showed, merely, in an action for double damages for the killing of plaintiff's cow by the defendant's locomotive or train of cars, under section 809, Revised Statutes, that the cow was found dead near the railroad track, bruised and so marked as to indicate that she had been struck with great force by some instrument, and there were, also, signs about the railroad ties indicating that the injury was inflicted on the track; but there was *no proof* that defendant was, at that time, *operating* said railroad, or that any train of cars or locomotive had passed over the road, at that point, at any time. *Held*, that section 809 contemplates an *actual* collision of the railroad company's *cars* or engine, *with the animal*; and, so far as appears by the record, there was no substantial fact in evidence, from which the jury might reasonably infer this important fact, essential to support the verdict, and that the demurrer to the evidence should have been sustained.

APPEAL from Cass Circuit Court, HON. NOAH M. GIVAN, Judge.

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Reversed and remanded.

The case is stated in the opinion of the court.

ADAMS & BOWLES, for the appellant.

I. To make defendant liable for double damages, the injury must have been inflicted by defendant while running or *operating* its railroad with *engines or cars*, and that the injury was by actual contact. Sect. 809; Rev. Stat.; *Lafferty v. Railroad*, 44 Mo. 291; *Hughes v. Railroad*, 66 Mo. 325; *Seiber v. Railroad*, 72 Mo. 565.

II. The statute is penal in its nature, in so far, at least, as the amount of the judgment exceeds the actual value of the animal; it should be strictly construed, and so as not to enlarge the liability it imposes, nor allow a recovery unless the party seeking it brings his case strictly within the terms or conditions authorizing it. *Parrish v. Railroad*, 63 Mo. 286; *Toy v. Railroad*, 21 Mo. App. —.

III. The court could not assume, in the absence of all proof, that defendant was running engines and cars on the road upon which the animal was found, or was operating the same at all, or by any agency so as to render it liable under section 809, of the statutes, which clearly contemplates an actual collision. Defendant's demurrer to the evidence and motion in arrest of judgment should have been sustained. *Lafferty v. Railroad*, 44 Mo. 291; *Seibert v. Railroad*, 66 Mo. 325; *Railroad v. McBrown*, 58 Ind. 575; *Schwartz v. Railroad*, 107 Ill. 577.

W. J. TERRELL, for the respondent.

I. The cases cited by defendant do not apply to the facts shown in *this* case. That in 44 Mo. 291 was for injuries caused by fright only. That in 66 Mo. 325 from being drowned in an abandoned well. That in 72 Mo. 563 was also from fright, primarily.

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II. The operating of the railroad is a reasonable inference from the admissions of the pleadings as to incorporation. The statute makes the coming onto the road and being killed by reason of a failure to fence, the gist of the action. In such cases the supreme court holds that circumstances, from which ingress and killing may be reasonably inferred, are sufficient. Laws Mo. 1883, p. 121, amending sect. 3653, Rev. Stat; *Jantzen v. Rail road*, 83 Mo. 171; *Gee v. Railroad*, 80 Mo. 283; *Lepp v. Railroad*, Sup. Ct. Mo. b. ch. I, '85; 1 Western Rep. 109; *Halferty v. Railroad*, 82 Mo. 90; *Meyers v. Trust Co.*, 82 Mo. 237.

III. The case was fairly submitted, upon instructions asked by defendant, only, and the objection urged here, if not waived by defendant's subsequent instructions, works no prejudice to defendant. *Bowling v. Hax*, 55 Mo. 446; *VanEvery v. Flanders*, 17 Mo. App. 241; *State v. Music*, 71 Mo. 401; *Meyers v. Union Trust Co.*, 237.

IV. No merits are shown for the appeal, and the judgment should be affirmed, with ten per cent. damages.

PHILIPS, P. J.—This is an action, instituted in a justice's court, to recover double damages for the alleged killing of plaintiff's cow by defendant's locomotive or train of cars. The action is based on section 809, Revised Statutes.

The plaintiff recovered judgment in double the value of the cow. Defendant has appealed.

At the conclusion of plaintiff's evidence, the defendant asked for an instruction to the jury in the nature of a demurrer to the evidence. The demurrer was based upon the ground of the failure of proof to show that the defendant did the injury complained of.

The proof showed merely that the cow was found dead near the railroad track, bruised and so marked as to indicate that she had been struck with great force by

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some instrument. There was, also, evidence of hair on and about the railroad ties, indicating that the injury was inflicted on the track. This was the whole of the evidence. There was no proof that defendant, at that time, was operating said railroad, that it was running any cars or locomotive over it, or that any train of cars, or locomotive, had passed over the road, at that point, at any time.

We know of no case holding such proof sufficient to uphold a verdict against a railroad company. There was sufficient evidence to have warranted the jury in finding that the force which occasioned the injury was applied on the track, and had this been followed by further proof that defendant was, at that time, running cars over that portion of the road, this would have been the proof of a collateral fact from which the jury might reasonably have inferred the principal fact that the injury resulted from collision with one of defendant's passing trains.

From aught that appears in this record, the defendant may not have been running a locomotive at all over this road, at the time in question. Section 809 contemplates an actual collision of the railroad company's cars, or engine, with the animal.

We have examined, carefully, this record, to discover whether there was any substantial fact in evidence from which the jury might reasonably infer the important fact essential to support the verdict; and are satisfied that the jury indulged in the merest assumption in finding for the plaintiff, The demurrer to the evidence should have been sustained.

The judgment of the circuit court is reversed, and the cause is remanded. All concur.

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O. B. HARWOOD, ADMINISTRATOR, ETC., Defendant in Error, v. BAXTER BROWN ET AL., Plaintiffs in Error.

Kansas City Court of Appeals, June 28, 1886.

PRACTICE—EVIDENCE—FAILURE OF CONSIDERATION—CASE ADJUDGED. Although the rule is established that oral testimony is inadmissible to vary or contradict the terms of a written instrument, so that a note, which, in its terms, is an *absolute* and unconditional promise to pay the sum of money therein specified, cannot be varied by evidence of a prior or contemporaneous oral agreement that the note, in a certain *contingency*, was not to be paid; *still*, it is not inconsistent with this rule to show by oral evidence a *want of, failure*, or fraud in the *consideration* of such a note. *Held*, that, according to the allegations of the answer, in this case, there was no consideration, whatever, for the giving of the notes sued on, except the agreement set up in the answer; and if the averments are true the notes in the hands of the payee were without consideration, and are also without consideration in the hands of his administrator. That the answer contained a good defence, a total want and failure of consideration.

ERROR to Cass Circuit Court, HON. NOAH M. GIVAN, Judge.

Reversed and remanded.

Statement of case by the court.

This was an action upon two promissory notes made by the defendants and payable to R. B. Harwood, the plaintiff's intestate.

The petition was in two counts. The answer to both counts was the same. After admitting the execution of the note and the administratorship of the plaintiff, the answer to the first count of the petition was as follows:

"Defendants admit that the sum of money, with all interest thereon, as expressed to be due and owing by said instrument, is unpaid, and that they, and each of

them, have refused, and still refuse, to pay the same, or any part thereof, though often demanded of them.

"Defendants say that plaintiff ought not to further have or maintain his said action against these defendants, or either of them, on said instrument, for they say that heretofore, to-wit: on the first day of August, 1877, this said defendant Baxter Brown and one Thomas P. Paxton were co-partners, doing business at the city of Warrensburg, state of Missouri, under the name of Paxton & Brown, and that, on said day, they, as such co-partners, and under their firm name and style, the said defendant James S. Brown joining with them as surety, made, executed, and delivered to said deceased, R. B. Harwood, their promissory note, in the following words and figures, to-wit:

"'$700.00.

"'Twelve months after date, for value received, we promise to pay R. B. Harwood, or order, the sum of seven hundred dollars, with interest from date at the rate of ten per cent., interest payable every six months.

"'This August 1st, 1877.

"'PAXTON & BROWN,
"'JAMES S. BROWN.'

"That afterwards, said R. B. Harwood, the payee in said note, endorsed and delivered same to one O. L. Houts, by the following writing thereon:

'"I hereby endorse the within note to O. L. Houts, waiving demand, protest, and notice.

"'R. B. HARWOOD.'

"That afterwards, on the twenty-third day of March, 1878, the said Paxton & Brown, being the owners of a certain stock of goods, wares and merchandise, sold, assigned and transferred the same to one S. G. Jackson, trustee, by their deed of that date, duly executed, acknowledged and delivered, in trust, however, and for the purpose of securing, among other purposes, the said

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deceased, R. B. Harwood, as endorser, and the said James S. Brown, as security on said note heretofore set out. That, afterwards, the said Paxton & Brown made default in said deed of trust. According to its terms and conditions, the said S. G. Jackson, as trustee, at the request of the said R. B. Harwood and said Jas. S. Brown, took possession of said stock of merchandise and proceeded to execute said trust by selling and disposing of same for cash, and did, thereafter, out of the proceeds of said sales, on the ninth day of April, 1878, pay on said note the sum of sixty dollars; and on the twentieth day of May, 1878, the sum of three dollars and seventy-five cents on said note, all of which said payments were duly endorsed on said note.

"That afterwards, on the seventeenth day of August, 1878, the said Paxton & Brown were, on petition of certain of their creditors to the United States district court, within and for the Western district of Missouri, adjudged involuntary bankrupts, under the laws of the United States, and that said bankrupt proceedings are still pending and undetermined in said court.

"That afterwards, to-wit: On the twenty-third day of September, 1878, these defendants, upon the representation to them made by said R. B. Harwood, deceased, that the said O. L. Houts had refused to make proof of said note against said Paxton & Brown bankrupt estate in said Federal court, and upon the further representation of said Harwood that an arrangement had been effected with said Houts, the endorsee of said note, by which, upon the execution of the note in controversy, and another note, being the same note mentioned and described in the second count in plaintiff's petition, the said Houts would deliver up to said Harwood the said note for the sum of seven hundred dollars, of date of August 1, 1877, on delivering to him (Houts) said notes mentioned in the first and second counts in plaintiff's petition, and that, unless this should be done, the said Harwood would lose all benefit of said estate.

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"That thereupon said Harwood and these defendants entered into an agreement with said Harwood, by and through his agent and attorney in said matter, said O. L. Houts, whereby it was agreed that the notes mentioned and described in plaintiff's petition should be executed and delivered to said Harwood, and should, by said Harwood, be endorsed to said Houts, and that thereupon the said Houts should deliver said note for the sum of seven hundred dollars, of date August 1, 1877, to said Harwood to enable said Harwood to make proof of same in said bankrupt court, with his lien against the stock of merchandise conveyed by said chattel deed of trust, and that after said Harwood should have made proof of said seven hundred dollar note, the notes in controversy should be taken up and re-delivered to defendants, and were to be thereafter of no binding force or effect whatsoever. Defendants say that, relying upon these representations, and with the sole desire and purpose of aiding said Harwood in accomplishing his desire of proving said note and lien against the bankrupt estate of said Paxton & Brown, and upon no other or further consideration, purpose or object, they executed the notes in controversy. Defendants state that upon the execution of the notes in controversy, the said O. L. Houts delivered said note of seven hundred dollars, of date August 1, 1877, to said R. B. Harwood, and that, afterwards, said Harwood, on the thirty-first day of October, 1878, made proof of said note before Charles E. Hess, one of the registers in bankruptcy of said district court, against the bankrupt estate of Paxton & Brown, and of his lien by virtue of said chattel mortgage, in the sum of $663.30, with interest from May 30, 1878, at ten per cent., as endorser thereof.

"That afterwards, on May 15, 1880, the said United States district court vacated said allowance with the lien and allowed said note in the sum of $671.20, including all accrued interest to that time, without such lien.

"That afterwards, to-wit: On the second day of June, 1880, the said R. B. Harwood received from said bank-

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rupt estate a dividend of four per cent. on the claim so allowed, amounting to the sum of $26.85.

"That afterwards, on the twenty-seventh day of July, 1880, the said R. B. Harwood received another and further dividend on said allowance from the said bankrupt estate of four and one-half per cent. of the amount thereof, to-wit: the sum of $27.10. Wherefore defendants say that the said note of August 1, 1877, is still in full force and effect, and that the said note mentioned in the first count of plaintiff's petition is without consideration, null and void, and that the plaintiffs, by reason of the premises, are estopped to assert the same against these defendants.

"Wherefore, having fully answered, defendants ask to be discharged, with their costs, as to matters set out in the first count of plaintiff's petition."

Plaintiff's reply denied the agreement set out in the answer; charged that the notes in suit were given in satisfaction and renewal of the said seven hundred dollar note made tender of, and offered to surrender that note to defendants.

Defendants offered the deposition of James S. Brown in evidence, which was excluded by the court, on the objections of the plaintiff.

The bill of exceptions shows that "defendants next offered to prove all the allegations of their said answer by the following witnesses, who were present in court, to-wit: Baxter Brown, Rufus G. Brown, defendants herein, and one O. L. Houts, and that the transaction and matters set up in the answer were had and conducted between said Houts, on behalf of deceased and defendants; that said Harwood was not present."

Plaintiff objected to any evidence to sustain the defence of a want of consideration as pleaded in said answer, which objection the court sustained; to which defendants at the time excepted.

The plaintiff offered no testimony, and at his instance the court instructed the jury as follows:

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"1. The court instructs the jury that they will find for plaintiff on the first count in the petition, in the amount of the face of the note therein described, with interest thereon according to the terms thereof, less the following credits, to-wit: June 2, 1880, $26.85; July 27, 1880, $27.10."

"2. The court instructs the jury that they will find for plaintiff on the second count in the petition in the amount of the face of said note, with interest thereon up to this date, according to the terms thereof."

The jury thereupon returned verdicts for plaintiff on first count in the sum of $450.00, and on the second in the sum of $769.85, and the court rendered judgment accordingly.

SAMUEL P. SPARKS, for plaintiff in error.

I. The original note, which formed the consideration for the new notes, never having been surrendered, the latter were without consideration. *Meyers v. Van Wagoner*, 56 Mo. 15.

II. It was competent for defendant to show that the new notes were given, not as evidencing any indebtedness, but for the purpose of enabling Harwood to prove up the original note *in bankruptcy*, and the court erred in excluding this testimony. *Merrick v. Boury*, 4 Ohio St. 60; 2 Daniel on Neg. Inst., sect. 1268. There was, also, proof of payment on the original note, which was not allowed to go to the jury.

III. Plaintiff's only remedy as endorser on the original note was *upon that note*. *Fenn v. Dudgale*, 31 Mo. 580; s. c., 40 Mo. 64.

O. L. HOUTS, for the defendant in error.

I. The answer sets up an agreement which contradicts the terms of the notes, and constitutes no defence to an action on them. *Foster v. Clifford*, 44 Wis. 569; *Jones v. Shaw*, 67 Mo. 667; *Rodney v. Wilson*, 67 Mo. 123; *Henshaw v. Dutton*, 59 Mo. 139; *Gardner v.*

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Matthews, 81 Mo. 627; *Davis v. Randall*, 115 Mass. 504.

II. The evidence of payment on the original note was properly excluded, because no such issue was presented by the pleadings.

III. The notes sued on are founded upon a valid and subsisting consideration—an unpaid original indebtedness—and it can make no difference whether they were given in extinguishment of it, or as payment *sub modo*, or as a collateral security, and plaintiff had a right to sue on them.

HALL, J.—The well established rule is that oral testimony is inadmissible to vary or contradict the terms of a written instrument. In accordance with this rule, a note, which in its terms is an absolute and unconditional promise to pay the sum of money therein specified, cannot be varied by evidence of a prior or contemporaneous oral agreement that the note, in a certain contingency, was not to be paid. *Smith's Adm'rs v. Thomas*, 29 Mo. 310, 311; *Henshaw v. Dutton*, 59 Mo. 139; *Jones v. Shaw*, 67 Mo. 667; *Ewing v. Clark*, 76 Mo. 545; *Gardner v. Matthews*, 81 Mo. 627.

But it is not inconsistent with this rule to show by oral evidence a want, failure or fraud in the consideration of such a note. *Smith's Adm'rs v. Thomas*, *supra*.

According to the allegations of the answer, the original note was not owned by the deceased, R. B. Harwood, at the time of the execution of the notes in suit, he having assigned it to O. L. Houts. Had R. B. Harwood still owned the original note at the time of the execution of the notes in suit, the time of the payment of the original note would have been extended as a consequence of the execution of the notes in suit until the latter should have become due, and the said extension of time would have been a sufficient consideration to support the new notes; and the terms of the new notes

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could not have been varied by proof of the oral agreement.

But if R. B. Harwood did not own the original note at the time of the execution of the notes in suit, the execution of the latter notes would have had no bearing, whatever, upon the original note, except by reason of some agreement between the parties. If the allegations of the answer are true, there was no consideration whatever for the giving of the notes in suit except the agreement set out in the answer. And in that case R. B. Harwood's representative cannot recover on said notes. In other words, if R. B. Harwood gave no other consideration for the notes than the making of the agreement alleged in the answer, the notes in his hands were without consideration, and are, also, without consideration in the hands of his administrator.

The answer contained a good defence, a total want and failure of consideration. The court erred in not permitting the defendants to prove said defence.

The judgment is reversed and the cause remanded. All concur.

23a 76, 31a 428; 23 76, 34 464; 23 76, 36 507, 39 293; 23 76, 40 423; 23 76, 44 633; 23 76, 48 152; 23 76, 49 418, 52 355; 23 76, 62 549; 23 76, 82 601

J. P. GOODSON, Respondent, v. THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 28, 1886.

PRACTICE—REQUIREMENTS OF RULE FIFTEEN OF THIS COURT—APPEAL DISMISSED.—Rule *fifteen* of this court requires that every part of the transcript *relied upon as error*, and all that is *necessary to show it such*, must be printed in the abstract. The *object* of the rule is that this court may be able to treat the appellant's abstract, unless the respondent shall file a counter-abstract, as *the record itself*, and be saved the time and trouble necessary for an examination of the transcript. Where no point is made on the pleadings, the *effect* of the pleadings may be stated in the abstract and that will be suffi-

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cient, and so when none is made as to the *sufficiency* of the *evidence* it will be enough to set forth its *tendency*. When the sufficiency of the evidence is *questioned*, so much of the transcript as contained all the evidence on *that question* should be set out in the abstract *in haec verba*. And so as to an *instrument* upon which appellant *rests*, he must set out the instrument itself, or so much of it as is necessary to show the error of the court complained of, *in the words of the instrument*. *Held*, that the abstract in this case is insufficient, as not complying with these requirements.

APPEAL from Carroll Circuit Court, HON. JAMES M. DAVIS, Judge.

Appeal dismissed.

GEORGE S. GROVER, for the appellant.

HALE & SONS, for the respondent.

Statement of case by the court.

The appellant has filed in this court the following abstract of the record in this case:

"This was an action instituted in the circuit court of Carroll county, Missouri, to recover the sum of two hundred and twenty dollars on account of damages alleged to have been sustained by plaintiff by reason of the negligent delay of certain live stock belonging to him while in transit upon defendant's railroad, between Kansas City, Missouri, and Carrollton, Missouri, on the twenty-first day of March, 1883."

The within abstract is not intended to be a full transcript of either the pleadings or evidence in this cause, but simply as an abridgment of so much thereof as, in the judgment of appellant, is essential to a proper understanding of the issues.

It was averred in the petition, that by a special contract between plaintiff's agents at Kansas City, and defendant, a car load of cattle was received by defendant at said place at 11:30 A. M. on the twenty-first day of March, 1883, for transportation and delivery to plaintiff

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at Carrollton. That said car was negligently and carelessly detained on the track at Kansas City at least four hours before starting, and was negligently and carelessly detained at various stations between Kansas City and Carrollton for at least three hours, and did not arrive at Carrollton until 11:45 P. M. of said day, having been delayed at least seven hours over the usual and reasonable time.

The answer of defendant admitted the execution of the special contract as averred by plaintiff, and also admitted the fact of the shipment itself. All the other allegations of the petition were denied.

For further answer, defendant set out the special contract of shipment in full, and averred that all of its conditions were kept and performed by the defendant, and broken by the plaintiff.

The reply of the plaintiff admitted the execution of the contract as set forth in the answer of the defendant, and denied the performance of its conditions upon defendant's part.

The plaintiff testified, that on the day in question, he received a shipment of cattle from Payne & Company, at Kansas City. There were forty-two head of yearling and two year old cattle shipped in the car. According to his recollection the train, with the cattle on board, arrived at Carrollton about twelve o'clock at night. The usual arriving time of that train was about seven o'clock P. M. It was one o'clock before they got the cattle unloaded. When the cattle were unloaded, they were in a very bad condition. One-third of them were unable to stand, and four finally died. The value of the cattle per head was from twenty-six to twenty-seven dollars. The general injury was from fifty to seventy-five dollars to the whole car load. The usual running time of that train from Kansas City to Carrollton was in the neighborhood of about five hours.

The conductor of the train told the witness at Carrollton, before the cattle were unloaded, that they were

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dead when they left Kansas City, and that they did not leave until after five o'clock. The conductor also said that he never saw cattle in such a shape in his life. That they were piled on top of one another and were half dead when they left Kansas City.

Upon cross-examination, the plaintiff stated in substance, that the car was not overloaded.

James H. Payne, witness for plaintiff, testified that he was a member of the firm of Payne & Co., at Kansas City; that he remembered buying and shipping to plaintiff on or about March 21, 1883. At the time they were shipped, the cattle were in good condition, or in such condition as stock cattle usually are at the time of loading them. Could not swear positively whether he superintended the loading of them or not. The usual time of loading stock for the noon train was 11:30. Sometimes a few minutes earlier or later, then they were hauled to the yards, the train made up, and they pull out at twelve o'clock.

A certificate issued by the firm of Payne & Co. was here introduced in evidence, which recited that the car contained forty-two head of cattle, and was loaded at 11:30 A. M., March 21, 1883.

The witness further stated, that he did not know at what time the train left Kansas City on this occasion. He only knew when the car was loaded, and had no personal recollection of the shipment.

The claim for damages made by plaintiff was here offered in evidence. It was dated March 22, 1883, and was admitted by defendant to have been received in due time. The original contract of shipment was then offered in evidence.

It was thereupon admitted by the parties, that the car of live stock in question was shipped under the contract in evidence; that said contract was the only one under which the shipment was made, and that it was executed March 21, 1883, by Payne & Co., as agents for the plaintiff.

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This was all the evidence in the case. The court then overruled defendant's demurrer to the evidence, and exceptions to such ruling were duly saved.

The following instructions were given for defendant:

"1. The court instructs the jury that under the contract in evidence, the burden of proving negligence on the part of defendant is upon plaintiff in this action, and the jury are instructed that if nothing more is shown than a mere delay of seven hours in the transportation of plaintiff's cattle from Kansas City to Carrollton, at the time in question, then the verdict must be for the defendant."

"2. If the jury find from the evidence that the injury and damages to plaintiff's cattle, at the time and place in question, was occasioned by putting too many of said cattle in the car, then they are instructed that plaintiff cannot recover in this action, and the verdict must be for the defendant."

The following instruction for defendant was refused:

"3. The court instructs the jury that even though you may find the defendant was negligent, by reason of delay, in the transportation of the cattle, under the other instructions given in this cause, and should find the issues for the plaintiff, then you can only, under the contract in evidence, and sued upon, return your verdict for such an amount as you may believe and find from the evidence the plaintiff actually expended in the purchase of food and water for said cattle, and no other amount whatever, and if the plaintiff expended nothing for that purpose, your verdict must be for defendant."

The court refused to give said instruction, to which ruling defendant duly excepted.

On the eighteenth day of December, 1883, the court, sitting as a jury, found a verdict in favor of plaintiff, assessing his damages at the sum of one hundred and fifty-eight dollars, and entered judgment against defendant for said sum.

On the same day defendant filed its motion for a new trial, assigning the usual grounds therefor.

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The cause was thereupon continued upon said motion until the March term, 1884, of said court, and on the twenty-seventh day of March, 1884, and at the March term thereof, said motion was, by said court, overruled, to which ruling and order of the court defendant then and there excepted.

On the same day defendant presented its bill of exceptions, which was signed by the court, whereupon defendant duly perfected its appeal to the supreme court of Missouri, where, by operation of law, the cause was transferred to this court.

HALL, J.—The appellant seeks a reversal of the judgment in this case, and assigns therefor two reasons. (1) That the evidence totally failed to show that the delay complained of in the petition was caused by the negligence of the defendant. (2) That the court erred in refusing to give the third instruction asked by the appellant, because, by the terms of the contract, in case of even negligent delay, the recovery was limited to the amount expended for food and water.

Rule fifteen of this court provides that "in all cases the appellant or plaintiff in error shall file with the clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision * * *."

Does the abstract or abridgment of the record, so called, filed by the appellant in this case comply with the requirements of that rule?

Those requirements are obligatory and binding, as we have frequently held (See *Foster v. Trimble*, 18 Mo. App. 394), and unless the appellant has complied with them his appeal will be dismissed.

The rule requires that every part of the transcript

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relied upon as error, and all that is necessary to show it such, must be printed in the abstract. The object of the rule is that we may be able to treat the appellant's abstract, unless the respondent shall file a counter-abstract, as the record itself, and in this way be saved the time and trouble necessary for an examination of the transcript.

Where no point is made on the pleadings the effect of the pleadings may be stated in the abstract, and that will be sufficient. And so where no point is made as to the sufficiency of the evidence it will be sufficient to set forth in the abstract the tendency of the evidence.

But the first point made in this case is that the evidence was insufficient to prove negligence on the part of the defendant as charged in the petition. The appellant should have set out in his abstract, *in haec verba*, so much of the transcript as contained all the evidence on that question. Without such an abstract we are unable to say what was the evidence or what was its effect, unless we examine the transcript. The appellant in his abstract has not pretended to set out the evidence as contained in the transcript in the words used in the transcript. The appellant has simply set out in the abstract his version of the evidence, that is to say, what the effect or meaning of the evidence was in his opinion. Without the words used in the transcript we cannot treat the abstract as the record itself.

The second point made by the appellant rests upon a certain special contract pleaded in the answer and offered in evidence by the appellant. And yet the abstract does not contain such contract. The statement of the case made by the appellant, to be sure, in the words, not of the contract, but of the appellant's counsel, does set forth what is said to be the substance and effect of the contract. But that will not suffice. The contract itself, or so much of it as was necessary to show the error of the court complained of, in the words of the contract, should have been set out in the abstract.

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The abstract was, therefore, in our opinion, insufficient. And the appeal is dismissed. All concur.

ROBERT L. HENRY ET AL., Appellants, v. W. T. MAHONE ET AL, Respondents.

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Kansas City Court of Appeals, June 28, 1886.

1. MECHANIC'S LIEN—CONTRACT WITH PARTNERSHIP FOR MATERIALS—EFFECT OF DISSOLUTION OF PARTNERSHIP—CASE ADJUDGED. Where a contract was made with a *partnership* to furnish materials for a building, and, pending the furnishing aforesaid, the partnership was *dissolved* by the retirement of one of its members; the continuity of the running account was broken by the dissolution of the original firm, and it required a new contract, express or implied, between the builder and the *new firm* to establish a *running account* between them.

2. ——— DISTINCT CONTRACTS—IN WHAT MATTER LIEN CLAIM MADE—CASE ADJUDGED.—When materials or labor have been furnished under *distinct* contracts, it is necessary that the lien should be filed under *such contract.* And if *plaintiffs* in this case are entitled to file a lien in their own names (as assignees of and successors to the interest of the retiring partner), they should have filed a *separate* lien on the claim, *prior and subsequent* to the dissolution, and not have *joined* them as *one account*, as they did, in this case.

APPEAL from Jackson Circuit Court, HON. TURNER A. GILL, Judge.

Affirmed.

Statement of case by the court.

On and prior to January 1, 1882, the plaintiffs and one Samuel B. Barker, were partners, doing business under the firm name of Henry, Barker & Coatsworth. On January 1, 1882, Barker retired from the firm, and assigned all his interest in the account sued on to the

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plaintiffs, who continued the business of the firm under the firm name of Henry Brothers & Coatsworth.

Prior to Barker's retirement, the firm of Henry, Barker & Coatsworth, had contracted with the defendant, W. T. Mahone, to furnish materials for the house mentioned in the petition and had delivered to Mahone, under the contract, materials to the value of $261.15. Afterwards, on January 2, and February 7, 1882, the plaintiffs furnished materials, under the contract aforesaid, to Mahone to the value of $35.41. At the time the materials were furnished, Mahone had possession of the lot in Kansas City, on which the house was being constructed, under a bond for a deed made by one P. S. Brown. Mahone failed to comply with the condition of said bond and after the house was completed, surrendered possession of the lot to Brown and cancelled the said bond. Afterwards, Brown conveyed the lot by warranty deed to J. N. Biddle.

On March 23, 1882, the plaintiffs filed their mechanic's lien in the office of the circuit clerk. The lien was a single one, including both the materials furnished by Henry, Barker & Coatsworth, as well as those furnished by the plaintiffs, with nothing to show that the accounts were separate, and with no assignment set forth. The aggregate amount stated to be due was $296.50, which was the sum of the two accounts. The affidavit of Jay Coatsworth to the lien states that "Robert L. Henry, George W. Henry, and Jay Coatsworth are partners as Henry Brothers & Coatsworth, and that the account annexed is a just and true account of the demand due said firm of Henry Brothers and Coatsworth from W. T. Mahone, for lumber and building materials furnished by the said firm at the request of, and under and by virtue of a contract with, the said W. T. Mahone," etc.

P. S. Brown and J. N. Biddle were parties defendant with W. T. Mahone. The court tried the case without the intervention of a jury.

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The court refused all the declarations of law asked by all the parties and made the following finding:

"The court finds the defendant, W. T. Mahone, indebted to plaintiff in the sum of $309.88 upon the account sued on; that plaintiffs have a mechanic's lien against the property in the petition described, as to $37.88 of the said indebtedness of said defendant, W. T. Mahone, but are not entitled to prosecute their said lien for a greater amount;" and the court rendered judgment accordingly.

The plaintiffs have appealed from said judgment.

W. J. STRONG, J. K. CRAVENS, for the appellants.

I. Prior to the filing of the lien one of the original firm retired and assigned his interest to his co-partners, the plaintiffs. Plaintiffs were substituted to all the rights of the original firm, and were entitled to enforce the lien for the whole demand, as the successors of the original contract.

II. The lien is only an incident to the debt, and an assignment of the debt carries with it the *right* to a lien; filing the lien is only one step towards enforcing the right, and while the claimant cannot enforce his lien against the *property* until he has complied with the provisions of the statute, still his *right* to the lien exists *from the time* that his *work* and *materials* go into the building. *Douglas v. Zinc Co.*, 56 Mo. 388. No greater right exists after filing the account than existed before, as it is the *furnishing of labor and materials* that gives the lien, and not the filing of the account.

III. The assignee of an account might file the lien and enforce it. *Goff v. Papin*, 34 Mo. 177; *Jones v. Hurst*, 67 Mo. 568. "The lien adheres to the debt, no matter how such debt may be evidenced." *Ib.*

IV. The statute must be construed literally so as to *advance* the *remedy*, and not merely in the strictness of the letter. *Putnam v. Ross*, 46 Mo. 337; *Oster v. Rabenan*, 46 Mo. 595; *De Witt v. Smith*, 63 Mo. 263.

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V. Previous to a judgment no lien, in fact, exists, hence the assignment of the right, *after* filing the account, could convey no more than would be conveyed by assigning the the account before filing. *Allen v. Mining and Smelting Co.*, 73 Mo. 688.

LATHROP & SMITH, for the respondents.

I. The *continuity* of the account between Henry, Barker & Coatsworth and Mahone was broken by the retirement of Barker, and a separate lien should have been filed for the two hundred and sixty-one dollars due from Mahone to the firm *when Barker retired.* This was not done either by the old firm or by their successors. The lien filed by plaintiffs in the name of *Henry Brothers & Coatsworth* for the amount due *them*, for lumber and materials furnished by *them* to Mahone, could not, certainly, entitle them to enforce a claim for materials furnished by *Henry, Barker & Coatsworth. G. B. Allen & Co. v. Mining and Smelting Co.*, 73 Mo. 688.

II. The lien under our statute is a personal right given to the mechanic, material man, or laborer, as the case may be, for his own protection; and the right to enforce it cannot be assigned or transferred to another. Hence any lien for the materials furnished to Mahone by the firm of *Henry, Barker & Coatsworth* must have been *filed by them*, and in their own name. *Roberts v. Fowler*, 3 E. Smith (N. Y.) 632; *Rollin v. Cross*, 45 N. Y. 766; *Pearsons v. Tinker*, 36 Maine, 384; *Caldwell v. Lawrence*, 10 Wis. 331; *Tewksberry v. Bronson*, 48 Wis. 581; *Brown v. Smith*, 55 Iowa, 37; *Langan v. Lankey*, 55 Iowa, 52.

HALL, J.—The firm of Henry, Barker & Coatsworth was dissolved by the mutual consent of its members. Such was the effect of the retirement of Barker from said firm. Henry Brothers & Coatsworth became the successors of Henry, Barker & Coatsworth, and continued to furnish materials to defendant Mahone, under the

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original contract between him and the first firm. The continuity of the running account was broken by the dissolution of the original firm. *Gerard B. Allen & Co. v. The Smelting Co.*, 73 Mo. 693.

It required a new contract, either express or implied, between Mahone and the new firm of Henry Brothers & Coatsworth to establish a running account between them. *Id.*

When materials or labor have been furnished under distinct contracts it is necessary that the lien should be filed under each contract. *Id.; Livermore v. Wright*, 33 Mo. 31. Conceding, for the purposes of this case, that the plaintiffs, on account of the fact that they were members of the original firm of Henry, Barker & Coatsworth, and that Barker had assigned to them his interest in the account in suit, might have filed a lien in their own names upon the said account; we are of the opinion that they should have filed a separate lien on that account, and should not have filed one lien upon that account united and joined with the account for materials furnished by them after the dissolution of the original firm. *Gerard B. Allen & Co. v. Smelting Co., supra.*

The finding and judgment of the circuit court were correct, and the judgment is affirmed. All concur.

JACOB FADLEY ET AL., Respondents, v. WILLIAM SMITH, Appellant.

23a 87 / 31a 384; 23 87 / 43 271; 23 87 / 47 499; 23 87 / 51 129; 23 87 / 67 445; 23 87 / 75 258

Kansas City Court of Appeals, June 30, 1886.

1. PRACTICE—DEMURRER AFTER ANSWER—DISCRETION OF TRIAL COURT—CASE ADJUDGED.—It is not error to strike from the files a demurrer, filed while the trial was pending, and *without leave*, and after answer had been filed, and the discretion of the trial court

was not abused to defendant's injury by the action of the court, in this case.

2. **CONTRACT—GUARANTY—PAYMENT OF PRICE NO WAIVER OF.—In the case of a contract of guaranty, the retaining of the property and payment of the purchase price would not affect or prevent recovery for its breach. Payment of the price is no legal waiver of the warranty.**

3. **PLEADING—MISJOINDER OF ACTIONS—WHAT IS THE REMEDY.—When causes of action which may be properly joined in one petition, are placed in one count, instead of being separately stated in separate counts, the remedy is by motion to require plaintiff to elect one and strike out the remaining causes thus improperly joined in one count. Where there are causes of action stated in the petition, either in one count or separate counts, which *cannot* be united in the same petition, but require *separate suits*, the remedy is by demurrer. Sect. 3515, Rev. Stat. Where there is a misjoinder and the remedy be either demurrer or motion to elect, it should be *filed and determined before the trial.***

APPEAL from Harrison Circuit Court, HON. CHAS H. S. GOODMAN, Judge,

Affirmed.

The case is stated in the opinion.

C. S. WINSLOW, for the appellant.

I. The demurrer was not too late. Actions *ex contractu* and *ex delicto* could not be united, under the code, in the same petition; and a motion at the close of plaintiff's evidence to compel him to elect was not too late. *Southworth Co. v. Lamb*, 82 Mo. 242; sect. 3572, Rev. Stat.

II. The contract admitted in evidence was at variance with the allegations in the petition and should have been excluded. *Jones v. Louderman*, 39 Mo. 287; *Harris v. Railroad*, 37 Mo. 308.

III. The instructions given for plaintiff assumed the existence of facts controverted by the pleadings and by plaintiff's own evidence and were, therefore, erroneous. They were also calculated to mislead the jury. *Wil-*

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kerson v. Thompson, 82 Mo. 317; *Donahoe v. Railroad*, 83 Mo. 560.

IV. The court erred in refusing instructions asked for defendant, as they stated the law applicable to the case correctly. The instructions, on the whole case, were inconsistent and contradictory; and for this reason the judgment should be reversed. *Goetz v. Railroad*, 50 Mo. 472; *State v. Nauert*, 2 Mo. App. 295.

V. Defendant's motion in arrest of judgment should have been sustained. A misjoinder of causes of action is fatal; and where such defect is apparent on the face of the record, the appellate court will take notice of it on appeal or writ of error, whether exceptions were saved or not. *Gray v. Payne*, 43 Mo. 203; *Peyton v. Rose*, 43 Mo. 139; *Southworth Co. v. Lamb*, 82 Mo. 242; *Henderson v. Dickey*, 50 Mo. 161.

HEASTON & BUTLER, and WANAMAKER & BARLOW, for the respondents.

I. The court properly struck defendant's demurrer from the files, as it was filed out of time and without leave of the court, after the pleadings were made up and the case was ready for trial. By standing upon his answer, and going to trial thereon, defendant *waived* his demurrer. *State to use, etc., v. Sappington*, 68 Mo. 454; *Ware v. Johnson*, 55 Mo. 500; *Gale v. Foss*, 47 Mo. 276; *Hall v. Johnson*, 57 Mo. 521. If matters were improperly united in the petition defendant's remedy would have been by motion to compel plaintiffs to *elect* and strike out the balance. *O'Conner v. Kock*, 56 Mo. 253; *Otis v. Bk.*, 35 Mo. 128; *Mulholland v. Rapp*, 50 Mo. 42; *Hotel Co. v. Sigemont*, 53 Mo. 176.

II. The court did not err in admitting in evidence the written contract on which the suit was founded. It was filed with the petition and did not *vary* from it, and the answer admitted its execution. There was no *specific* objection made as to its admissibility. *Kautz v. Tempel*, 48 Mo. 71; *Buckley v. Knapp*, 48 Mo. 152;

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Grimm v. Gamache, 25 Mo. 41; *Holmes v. Braidwood*, 82 Mo. 610; *Allen v. Mansfield*, 82 Mo. 688; *Bowie v. Kansas City*, 51 Mo. 454; *State to use, etc., v. Webster*, 53 Mo. 135.

III. The instruction *given* for plaintiff did not *assume* facts, but was hypothecated upon the evidence. The evidence upon which it was based is not preserved in the bill of exceptions. *Broadwell v. Bouton*, 39 Mo. 401; *Kansas City v. Kelley*, 39 Mo. 415.

IV. The instructions *refused* to defendant were *not* founded on the evidence. Payment of part of purchase price is no legal waiver of breach of warranty. 2 Suth. on Dam. 128, 415, 422; *Compton v. Parsons*, 76 Mo. 455; *Bronson v. Turner*, 77 Mo. 492; *Carter v. Black*, 46 Mo. 384.

V. The court properly overruled defendant's motion in arrest of judgment. There are not two causes of action set out in the petition. Even if petition was defective, if the verdict could not have been given without proof of omitted matter, the defect will be cured. *Jones v. Louderman*, 39 Mo. 287; *Bowie v. Kansas City*, 51 Mo. 454.

C. S. WINSLOW, in reply.

I. The instruction for plaintiffs failed to limit the amount plaintiffs were entitled to recover upon the pleadings, and was erroneous. *Crews v. Lackland*, 67 Mo. 619.

II. An instruction on *the whole case*, must not exclude the points raised by the evidence of the opposite side. *Fitzgerald v. Hayward*, 50 Mo. 516; *Goetz v. Railroad*, 50 Mo. 472.

III. The defects in the petition were not cured by verdict. The defect was of *substance* and not of *form*. *Ivory v. Carlin*, 30 Mo. 142.

ELLISON, J.—Defendant sold plaintiffs a portable saw mill and gave a written guaranty in the bill of sale,

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whereby he guaranteed the mill to saw five thousand feet of lumber per day, if properly managed by competent men. The guaranty was to continue for ten days from its date, only, and contained a stipulation that in case the mill failed to perform as agreed, plaintiffs should notify defendant "within ten days from this date (date of guaranty) of said failure."

"Pending the trial of said cause" defendant, without leave, filed a demurrer to the petition and asked to withdraw his answer. The court refused leave to withdraw and struck the demurrer from the files.

The trial was then proceeded with. Plaintiffs offered the written guaranty in evidence "to the introduction of which defendant at the moment excepted." "Defendant also objected to the introduction of any evidence under the petition." The objection was overruled, to which action of the court "defendant at the moment excepted." Plaintiffs gave evidence tending to support their petition, and defendant tending to support his answer. One instruction asked by plaintiffs was given, and of the six asked by defendant, three were given and three refused. The trial resulted in plaintiffs' favor and defendant appeals, contending here, that his demurrer should not have been stricken from the files; that his objections to testimony should have been sustained, and that plaintiffs' instruction should not have been given, and his should not have been refused.

The demurrer being filed during the trial, while the trial was pending, was properly stricken out. Allowing a pleading to be filed out of time is much in the discretion of the trial court, and certainly, we cannot say that discretion was abused to defendant's injury, by striking from the files a demurrer, which had been waived by the answer, and which had been filed without leave, while the trial was on.

The objection to the introduction of the guaranty was properly overruled, no reason being assigned therefor. This has been frequently held in this, and in

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the supreme court. So too, with regard to the objection to any evidence under the petition. There is not the remotest suggestion made as to why evidence should not be received under the petition.

The instruction for plaintiff was properly given, and, in connection with those granted the defence, fully covered the issues in the case.

Instruction number four, refused for defendant, asserted the proposition that if plaintiffs retained the property and paid the purchase price they could not recover. I do not understand such to be the law in this sort of case. "Payment of the price is no legal waiver of the warranty." 2 Suth. Dam. 128. If we should concede, as is claimed by defendant, that there is a misjoinder in plaintiffs' petition, the point would avail him nothing. Advantage of such improper pleading cannot be taken advantage of by motion in arrest. The doctrine announced in the quotation and citation of defendant has been exploded in this state. *Sweet v. Maupin*, 65 Mo. 63–72; *House v. Lowell*, 45 Mo. 381; *Pickering v. The M. V. N. T. Co.*, 47 Mo. 457.

The law is that when causes of action, which may be properly joined in one petition, are placed in one count, instead of being separately stated in separate counts, the remedy is by motion to require plaintiff to elect one and to strike out the remaining causes thus improperly joined in one count. *Otis v. Mechanics' Bank*, 35 Mo. 128; *Mooney v. Kennet*, 19 Mo. 551; *Christal v. Craig*, 80 Mo. 367.

Where there are causes of action stated in the petition, either in one count or separate counts, which cannot be united in the same petition, but require separate suits, the remedy is by demurrer. And it is such incongruous uniting of actions to which the fifth subdivision of section 3515, Revised Statutes, relating to demurrers refers. *Otis v. Mechanics' Bank*, *supra*.

It has undoubtedly been the rule in this state, that where there is a misjoinder and the remedy be either

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demurrer or motion to elect, it should be filed and determined before trial. "The opportunity is offered, by demurrer and motion, to settle, *before trial*, all question of pleadings, and if the opportunity is not embraced, defects should be held to have been waived, and the verdict should not be disturbed." *House v. Lowell*, *supra*.

Conceding it to be true, as alleged in this case, that two causes of action are united in one count, and the damages are charged but once, and are predicated upon both causes of action, the pleading is not good, "but should be corrected by motion, *before pleading over*, to require the plaintiff to elect upon which cause to proceed, and that the other be stricken out." *Stevenson v. Judy*, 49 Mo. 227. And if no such motion is made it will be deemed waived. *Christal v. Craig*, *supra*.

The demurrer in this case, being for the improper joining, in the same count, of causes of action which could not be united in the same petition, was the proper remedy, if taken in time, but, being filed after answer and after the beginning of the trial, was waived.

Our attention has been called to the case of *The Southworth Co. v. Lamb* (82 Mo. 242), where two causes of action were united in the same petition, which, from their nature, required separate suits, and where a motion was made at the close of plaintiff's testimony to require him to elect on which he would proceed. Under the authorities above cited there should have been a demurrer to this petition before trial. But Ewing, Commissioner, says it "amounted to a demurrer, and, although coming a little late, was properly sustained."

It does not appear from the report of the case whether the plaintiff objected to this in the lower court. I cannot believe the court, in that case, have aimed to overthrow, without mentioning them, the long list of decisions holding to the rule, as I have stated it. The motion in that case was made in the middle of the trial and while the answer, of course, was on file. The court

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remarked that it amounted to a demurrer, but it is fundamental that a demurrer and an answer are inconsistent pleading and cannot stand together. One is an admission, while the other is a denial.

This court must, in accordance with the constitution of the state, look upon the last previous ruling of the supreme court as controlling authority; but when we are satisfied a rule, long established, and which is recognized by numerous decisions of the supreme court, is not intended to be overthrown, nor the decisions intended to be overruled, we will still recognize the rule, unless the last utterance of the supreme court is irreconcilable with it.

Our conclusion is that the judgment should be affirmed, and, with the concurrence of the other judges, it is so ordered,

SEPARATE OPINION BY PHILIPS, P. J.—I concur in the result of the foregoing opinion in affirming the judgment. But I do not concur in the criticism made therein on the opinion of Ewing, C., in *Southworth, etc., v. Lamb*. It is not just, in my view, to attribute to that opinion that it, in effect, holds that a demurrer to a petition on the ground that it improperly unites two incongruous causes of action may be made after trial. It expressly recognizes the correctness of the rule of practice that such plea should be interposed before trial, for it quotes approvingly the opinion of Bliss, J., in *House v. Lowell*, 45 Mo. 383. It then proceeds to say that the demurrer, "although coming a little late, was properly sustained. It was filed after hearing plaintiff's evidence, and was thus more favorable to plaintiff by developing the facts upon which a verdict must be based before electing upon which cause of action to stand. If filed after verdict it would undoubtedly have been too late, and would have waived the defect; but coming, as it did, after hearing

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the plaintiff's evidence, and before the case was submitted to the jury, it should have been sustained."

The effect of this holding was simply this: although the plea came late it was, in effect, before the trial, for the cause was not submitted, and the court might, without abuse of its discretion, entertain the plea, and as the petition was obnoxious to the objection of a misjoinder, and the election was made by the plaintiff just after his evidence was in, and he could make such election at a time when it would be most advantageous to him, no such injury was apparent from this action of the court, as would constitute reversible error. This, doubtless, was the view entertained by Judge Ewing's associates, and the supreme court judges who approved the opinion.

The practice act provides, that: "The court shall, in every stage of the action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

Had the court, in that case, declined to entertain the motion, it no doubt would have been held not to constitute error for which the judgment should be interrupted.

Properly, the motion or demurrer should be interposed before trial begun, and unless the party complaining has thus invoked his remedy he has no standing to demand that his plea should be heard after trial begun.

By entertaining the plea, as the court did in the case of *Southworth*, *supra*, it was the same, in legal effect, as if the answer had been withdrawn, and the plea heard, although the record be silent as to the formal withdrawal of the answer. *Dunklin County v. Clark*, 51 Mo. 60; *Sweeney v. Willing*, 6 Mo. 174; *Fuggle v. Hobbs*, 42 Mo. 538; *Pickering v. Miss. Valley, etc., Co.*, 47 Mo. 460.

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E. L. MARTIN & CO., Respondents, v. T. I. JOHNSON, Defendant; JOSEPH S. JOHNSON, Interpleader, Appellant.

Kansas City Court of Appeals, June 30, 1886.

1. ESTOPPEL—CREDITOR AND DEBTOR—COURSE OF BUSINESS—CASE ADJUDGED.—Where the interpleader, as in this case, transferred to defendant two note for the purpose of enabling him to effect a settlement with plaintiffs (who had brought suit against defendant in attachment), and defendant had used them for that purpose, and there was no evidence that plaintiffs had any *knowledge* of the purpose or arrangement between interpleader and defendant, but took them in the usual course of business in part payment of the debt of defendant; there was no estoppel as against plaintiffs. The creditor, to be affected with any equities between the debtor and the party from whom he obtains the property, thus transferred to the creditor, must have *knowledge* of the facts and circumstances under which the same was obtained.

2. PRACTICE — ISSUES — INSTRUCTIONS — CASE ADJUDGED.—Where the issues, as in this case, allege fraudulent collusion between the defendant and interpleader, it is error to ignore these issues in the instructions, and such instruction was properly denied in this case.

APPEAL from Johnson Circuit Court, HON. NOAH M. GIVAN, Judge.

Affirmed.

The case and facts are stated in the opinion.

SAMUEL P. SPARKS, for the appellant.

I. The sale of the property was clearly within the exception of section 2505, Revised Statutes. The instrument was recorded within a reasonable time, and the recording of it obviated the necessity of any change in the possession. *Bishop v. McConnell*, 56 Mo. 158.

II. The sale of the property to interpleader was not fraudulent as to plaintiffs, for it was made subsequent to the suing out of the attachment, and for plaintiffs'

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benefit. There was no withdrawing of the property from the reach of creditors. *Gutzweiler v. Lackman*, 23 Mo. 168; Bump on Fraud. Conv. (2 Ed.) 19-26.

III. The evidence was uncontradicted that, at the time of sale, and down to the time of execution of lease to defendant, the saloon was in possession of one Carey There was no change in the possession necessary, as between vendor and vendee. *Erwin v. Arthur*, 61 Mo. 386.

IV. The court erred in not allowing interpleader to show that, at the time the lease was filed for record, no seizure had been made under the attachment, *i. e.*, the court erred in not permitting him to contradict the return of the sheriff as to the time of the attachment. *Burgert v. Borchert*, 59 Mo. 80.

GAGE, LADD & SMALL, for the respondents.

I. The proposition embraced in instruction number four, refused appellant, was already fully and fairly declared in other instructions.

II. Section 2505, Revised Statutes (requiring an actual change of possession within a reasonable time) has no application to this case, *as regards the lease.* But the *recording* of the lease from the interpleader to defendant could not have supplied the failure to meet the requirements of the statute as to a change of possession. Even a bill of sale *recorded* would have been no substitute for a change of possession.

III. The notes taken by plaintiffs from defendants, as payment on his indebtedness, in absolute ignorance of interpleader's dealings with defendant concerning them, everything indicated, at that time, that the notes were, and always had been, the property of defendant. Having taken then in entire *innocence*, they are not precluded from attacking for fraud the validity of the transfer of the property for which they are now alleged to have been the consideration. To be *estopped* from asserting the fraudulent nature of a transaction, the creditor must

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either have been a party to it, or he must *knowingly* have received the benefits of it. *Neither fact exists here. Hathaway v. Brown*, 22 Minn. 214; *Baldwin v. Tuttle*, 23 Ia. 72; *McFarlane v. Fouke*, 1 Watts & Serg. (Pa.) 297.

IV. The testimony as to the sheriff's *return* was properly excluded, for the reason that it was wholly *immaterial*. The date of the levy was immaterial; the recording, or the failure to record, the lease, could have no effect upon the case.

PHILIPS, P. J.—This was an action by attachment, begun by plaintiffs E. L. Martin & Co., against the defendant T. I. Johnson. The defendant seems not to have made any defence to the attachment, but the said Joseph S. Johnson, who is the brother of T. I. Johnson, interposed an interplea, claiming that he was the owner of the property attached. The evidence showed that the property in question consisted of a counter and work bench, two side boards, one good ice chest, and one old ice chest. This property was kept and used in a saloon owned and run by defendant T. I. Johnson, in the town of Holden, in Johnson county, up to January, 1885, as the evidence shows, without any dispute. About that time, T. I. Johnson was pressed by some creditor, and the evidence tended strongly to show that he thereupon let the saloon to one Carey, to run in his (Carey's) name, but, as a matter of fact, the possession of Carey was only colorable, and T. I. Johnson remained the real owner. The evidence, while it tended to show that the interpleader, Joseph S. Johnson, was the owner of the house and lot in which the saloon was situate, it is most questionable whether or not the same did not in reality belong to T. I. Johnson. At all events, T. I. Johnson always claimed to be owner, and he never seems to have paid any rent to his brother therefor.

On the seventh day of April, 1885, the plaintiffs sued out a writ of attachment in aid of their action against

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said T. I. Johnson, to recover a large amount of indebtedness owing them by T. I. Johnson. On the day following, when the plaintiffs went with the sheriff to execute this writ on the goods in question, at the instance of the defendant, who was the ostensible owner, the execution of the writ was postponed to enable the defendant to go to Kansas City, where the plaintiffs reside, under a promise to satisfactorily arrange the matter with them. He accordingly did go to see them, and turned over to them two promissory notes, aggregating four hundred dollars, secured by deed of trust on real estate in Holden, and also some whiskey, leaving still a considerable balance unpaid on plaintiffs' claim. He, also, then promised to arrange the balance. Failing to do so, on the twenty-first day of April following, the plaintiffs executed said writ of attachment by having the sheriff seize the said property in said saloon.

The interpleader claimed that, on the said eighth day of April, his brother, T. I. Johnson, came to him to get the money with which to settle with the plaintiffs, in order to stop said attachment proceedings, and that he then turned over to him the two notes aforesaid. That the said notes were originally made payable to the said T. I. Johnson, from whom he bought them, or obtained them, in the course of trade. They were endorsed with the name of T. I. Johnson. There was no other mark of endorsement on them when turned over by T. I. Johnson to the plaintiffs. The interpleader, also, claims that in consideration of the surrender to T. I. Johnson of said notes, the latter turned over to him the saloon fixtures in question, and on that day he rented to said T. I. Johnson said property, taking from him a written lease, but the same was not recorded until the twenty-first day of April, 1885, at 10:20 p. m.

The case was tried before the court sitting as a jury.

There was some other evidence in the case, but not of material importance.

The plaintiffs asked no declarations of law.

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On behalf of interpleader, the court gave the following declarations:

"1. The court declares the law to be that, if it should find and believe, from the evidence in the case, that the property in controversy was large and cumbersome, and was only suitable for and in necessary use at the time of such sale, for the purpose of which interpleader had rented the building in which same was situate, then it was not essential to the validity of such sale or transfer to interpleader of same, that there should be an actual delivery of said property by said defendant to interpleader, and be followed by an actual and continued change in possession of same."

"2. The court further declares the law to be, that if it should find and believe, from the evidence in the case, that the interpleader was the purchaser in good faith, for a valuable consideration, without any knowledge, notice, or information, of any fraudulent intent on the part of defendant to hinder, delay, or defraud, his creditors of the property in controversy, and that the same was situated at the time in a building owned by interpleader, and then occupied by one Samuel Carey as tenant of interpleader, and that the property, although owned by defendant, was in the possession of said Carey, then it became and was unnecessary to the validity of such transfer to interpleader that there should have been any change of the possession between Carey and interpleader."

The court refused to give the following declarations of law:

"3. The court declares the law to be that, if it should find and believe, from the evidence in the case, that the interpleader was the owner in good faith for a valuable consideration, and in possession of notes to the amount of four hundred dollars, secured by a deed of trust, and that, for the purpose of enabling the defendant to make a payment on his indebtedness to plaintiffs, he surrendered and re-delivered the same to said defendant in considera-

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tion of the transfer of the title to the property in controversy, by him to interpleader, and, thereupon, said defendant turned over to plaintiffs said notes, and the same was accepted by them in payment of so much of their said indebtedness against defendant, then plaintiffs are estopped and precluded from denying the validity of such transaction between interpleader and defendant, and the finding and judgment should be for interpleader."

"4. If the court shall find, from the evidence in the case, that at and prior to the purchase by him of the property in dispute, the interpleader was the owner of the building in which said property was then situated, and has continued to be the owner thereof, and at the time of the purchase of said property, said building was occupied by one Carey, as the tenant of interpleader, and the court shall further find, from the evidence, that said property was adopted and used for the carrying on of the business of such tenant of the interpleader in said building, then the court declares the law to be that, as against the plaintiffs, no other change of possession was necessary to invest interpleader with the perfect title to said property, and the finding will be for interpleader."

The court, thereupon, found the issues for plaintiffs, and interpleader has appealed.

I. We are satisfied, on a review of this evidence, that the finding of the court was for the right party. It was well supported by the evidence. In fact, the *indicia* of fraud and collusion between these two brothers is so palpable that it is difficult to see how the court could have found otherwise. Unless, therefore, the instructions given and refused by the court indicate that the court tried the case on the wrong theory, we will not disturb its finding.

The substance of the real issues in this case was fully contained in the two instructions given by the court. The third instruction was properly refused. We fail to discover in this record any estoppel predicable of the fact

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that T. I. Johnson turned over to plaintiffs the notes, claimed by interpleader to have been transferred by him for the purpose of enabling him to effect a settlement with plaintiffs. There was nothing on the face of the notes to indicate that interpleader ever owned them. On their face they were payable to T. I. Johnson. There is no evidence that plaintiffs, when they took the notes, had any knowledge of the purpose for which interpleader obtained them. They took them in the usual course of business, just as any creditor would take property from his debtor in part payment of the debt, without anything to excite suspicion, or put them on inquiry as to the circumstances under which the debtor obtained the property. And as there is no pretense that T. I. Johnson obtained the notes fraudulently, and did not, in fact, own them when he turned them over to plaintiffs, how can any estoppel arise in the case?

The creditor, to be affected with any equities between the debtor and the party from whom he obtains the property, thus transferred to the creditor, must have knowledge of the facts and circumstances under which the same was obtained. *Hathaway v. Brown*, 22 Minn. 214; *McFarlane v. Fouke et al.*, 1 Watts & Serg. 297; *Baldwin v. Tuttle*, 23 Ia. 72.

The fourth instruction was properly denied, both for the reason that the court had already, in the declarations given, conceded to the interpleader as much as he was entitled to on the issue of the visible transfer of possession, and especially because it ignored the issue of the fraudulent collusion between the parties, the two Johnsons, and the evidence strongly tending to show that Carey's possession was in fact that of T. I. Johnson, who had really continued in possession all the time.

We do not perceive the importance to be attached to the claim of appellant that this pretended lease to his brother was recorded before the attachment was actually levied. It made no difference, even if the statute had authorized the recording of such instruments of writing,

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for the real question at issue was, was the interpleader an innocent purchaser for value without notice?

The verdict of the court undoubtedly was against this pretension, and the verdict was amply supported by the evidence.

The judgment is affirmed. All concur.

THE BOLCKOW MILLING COMPANY, Respondent, v. TURNER, FRAZER & COMPANY ET AL., Appellants.

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74	245

Kansas City Court of Appeals, June 30, 1886.

1. PERSONAL PROPERTY—PURCHASE PRICE OF—CONSTRUCTION OF SECTION 2353, REVISED STATUTES.—Section 2353, Revised Statutes, provides: "Personal property, shall, in all cases, be subject to execution on a *judgment* against the purchaser for the *purchase price* thereof; and shall in no case be exempt from such judgment and execution, *except in the hands of an innocent purchaser, for value, without notice of the existence of such prior claim for the purchase money.*" The object of the statute is to enable the *vendor* of personal property to *subject* it by execution on a judgment *against the purchaser* for the purchase price thereof, to the *payment* of said purchase price, *except* only where the said property is in the hands of an innocent purchaser, for value, without notice of the existence of the (unpaid) claim for the purchase price.

2. ——— PROPERTY IN LEGAL CUSTODY—RULE AND EXCEPTIONS—CASE ADJUDGED.—The general rule is, that property in legal custody is not subject to be seized by other judicial process, and when it is *held* under judicial process it cannot be *seized* under other judicial process. But this *general* rule, where it is necessary, must yield, in order for the right given by this statute to be enforced, and personal property held under an attachment can be seized under an execution on a judgment against the purchaser for the purchase price of the property, unless the attaching creditor can be held to be an innocent purchaser, for value, *etc.* The statute makes only *one* exception. Creditors are not named in the exception; and *creditors* are not *innocent purchasers.*

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8. ——— ——— DISTRIBUTION OF PROCEEDS.—Where, in such cases, as in this case, the judgment had been entered for the vendor for the purchase price of the property, *before* the order made by the court for the *distribution* of proceeds was granted, the issuance of an execution was unnecessary; because the property had been sold under an order of the court and the proceeds were in the hands of the sheriff. The order of the court for the distribution of the proceeds took the place of an execution.

APPEAL from Nodaway Circuit Court, HON. HENRY S. KELLEY, Judge.

Affirmed.

Statement of case by the court.

This was a controversy between the respondent and the appellants, who were all attaching creditors of Wm. Young. The controversy was submitted to the court on the following agreed statement of facts:

"Come now the parties hereunto and state to the court, that on the twenty-sixth day of June, 1883, before one A. G. Lucas, a justice of the peace in and for Hopkins township, Nodaway county, Missouri, Turner, Frazer & Company began an attachment suit against one William Young, and in said attachment suit levied upon, on that date, one hundred and fifty half sacks of flour, as will appear upon and by the return of the officer who levied said writ of attachment.

"That, on the sixth day of July, 1883, before the same justice of the peace, at one o'clock and thirty minutes, p. m. of said day, one Samuel Bliss began his suit in attachment against the said William Young, and in said attachment suit levied upon, at that time, three hundred and thirty half sacks of flour, among the property itemized, as will appear by the officer's return upon said writ of attachment.

"That, on the ——— day of ———, 1883, before same justice, Henry J. Lowe began his suit in attachment against said William Young, and in said attachment levied upon three hundred and thirty half sacks

of flour, among other property, as will appear by return upon said writ of attachment. That, on the twenty-eighth of June, A. D., 1883, before N. H. Herbert, justice of the peace in said township, county, and state, James Allison began his suit in attachment against said William Young, and in said attachment suit levied upon one hundred and thirty half sacks of flour, as will appear by the return of the officer who levied said writ of attachment in said suit. That all the foregoing suits in attachment have heretofore been certified by said justice of the peace, before whom same were brought to this court upon the application of the Bolckow Milling Company, under section 447, page 71, volume 1, Revised Statutes, 1879.

"That, on the twenty-fifth day of June, A. D., 1883, Wm. Jackson began his suit in attachment in this court against said William Young, and in his suit levied upon one hundred and twenty two sacks of 'Gem' flour, fifty-nine sacks of 'Heart's Content,' fifteen sacks of 'Exactly So.' That this flour was 'levied upon on the twenty-fifth day of June, 1883, among other property. That on the seventh day of July, A. D. 1883, the Bolckow Milling Company began its suit in this court by attachment against said William Young, and levied its writ upon all the flour mentioned hereinbefore, which had been attached by the officers in the suits aforesaid.' It is further stated that the suit of said Bolckow Milling Company was for the unpaid purchase money due to said Bolckow Milling Company from William Young, defendant in all of said attachments, for the purchase of the flour aforesaid..

"All the attaching creditors admit that the Bolckow Milling Company attached said flour for a debt owed to said milling company for the unpaid purchase money for said flour. That none of the claims of the other attaching creditors are for unpaid purchase money. (William Jackson, said Jackson, had no knowledge of contents of contract exhibited herewith, and James

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Allison had notice of the fact that the flour was not paid for at the time of bringing suit).

"It is further stated that the contract between the Bolckow Milling Company and William Young is same as hereto attached.

"The Bolckow Milling Company claim that all said flour is subject first to its writ, owing to same being liable to pay them for their purchase money. The rest of attaching creditors claim that the flour is subject to attachments according to the date of the respective levies, and the court, upon this statement, which is agreed to by the parties, and inspection of the attachment papers is asked to settle right of parties."

(Signed by all the attaching creditors mentioned in said agreed statement.)

After the filing of the agreed statement of facts, judgment was rendered in favor of the plaintiffs and against Young in each of the attachment suits. After the rendition of such judgments, the Bolckow Milling Company filed a motion, asking the court to make an order on the sheriff to pay to it the proceeds of the sale of the flour hereinbefore mentioned, in satisfaction of its claim in perference to all other attaching creditors, under the pleadings and agreed statement of facts. The court granted the motion and judgment was accordingly entered. From said judgment the other attaching creditors have appealed to this court.

C. A. ANTHONY, R. H. WITHEY, and BEECH & ELLISON, for the appellant.

I. By the service of theis writs of attachment against Young, appellants acquired a lien on the property which no subsequent attachment could defeat. The property was then in the custody of the law, and beyond the reach of seizure by another execution or attachment. Drake on Attachments (5 Ed.) sect. 224; *Patterson v. Stephenson*, 77 Mo. 327; *Metzner v. Graham*, 57 Mo. 404.

II. Section 2353, Revised Statutes, has the effect

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only of preventing the judgment debtor from claiming the property, *exempt from such judgment or execution*, and does not in any manner affect the right or priorities of attaching creditors. The statute simply deprives the execution debtor from *claiming* the property *when seized on execution*, and nothing more. There is no lien existing in favor of the vendor. *Menicke v. Bracksek*, 14 Mo. App. 316.

III. Under section 2507, and the latter part of section 2505, Revised Statutes, if the milling company had sold this flour to be paid for in *instalments*, the creditors could hold the flour, because the sections cited had not been complied with, and that it was *all sold on time* could make no difference, unless the parties had effected a lien, or reserved the title to themselves in the manner pointed out. The right to attach and take the property by any other creditor is complete.

IV. There is no vendor's lien in the case of sale of personal property where possession is given. An attachment has priority over the right of action for the purchase money, *if first levied*. Story on Cont. (4 Ed.) sect. 795.

W. W. RAMSAY, for the respondent.

I. Under section 2353, Revised Statutes, the flour in question was subject to the payment of respondent's debt in preference to all prior attaching creditors, *none* of said creditors suing for *unpaid purchase money*.

II. The statute now in force (sect. 2353, Rev. Stat.) differs very materially from the act of 1874 (Laws of Mo. 1874, p. 118, sect. 1), and has a much broader scope. *Norris to use, etc., v. Brunswick*, 73 Mo. 256. The *former* was restricted practically to the immediate parties to the transaction; the *latter* subjects the property for the purchase price against *everybody*, *except* an *innocent purchaser*, for value, without notice, *not* creditors, nor "prior attaching creditors." *Parker v. Rodes*, 79 Mo. 88.

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III. Sections 2505 and 2507, Revised Statutes, do not conflict with the provisions of section 2353. The respondent is not seeking to assert a conditional sale of the flour in question to Young; nor to claim a forfeiture on such an account. Even if the former sections are in conflict with section 2353, the *latter* must prevail, being the last expression of the legislative will, the former being enacted in 1877, and the latter in 1879. But there is no such conflict. Sedgwick's Const. Stat. (2 Ed.) 104; *De Pana v. New Albany*, 22 Ind. 204; *State v. Draper*, 47 Mo. 29.

HALL, J.—The claim made by the Bolckow Milling Company rests upon section 2353, Revised Statutes, which provides as follows:

"Personal property shall, in all cases, be subject to execution on a judgment against the purchaser for the purchase price thereof, and shall in no case be exempt from such judgment and execution, *except in the hands of an innocent purchaser, for value, without notice of the existence of such prior claim for the purchase money.*"

It cannot be said that the statute confers upon the vendor of personal property a lien for the purchase price thereof. *France v. Thomas*, 86 Mo. 80; *Menicke v. Bracksek*, 14 Mo. App. 315. The right conferred by the statute may, however, in some cases, partake of the character of a vendor's lien. *Menicke v. Bracksek, supra.*

In speaking of this statute, the supreme court of this state has said: "Under this statute the vendor of personal property who had obtained a judgment against the vendee, might seize the property on execution in the hands of a purchaser thereof, with notice that the purchase price had not been paid, and *it would probably authorize the vendor, under circumstances justifying a suit by attachment against the vendee, to seize such property in the hands of a third person* purchasing

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with notice that the property had not been paid for." *Parker v. Rodes*, 79 Mo. 88.

From these remarks it is clear that the supreme court entertains the opinion that this statute should be so construed as to carry out the object for which it was enacted.

That object was to enable the vendor of personal property to subject it by execution on a judgment against the purchaser for the purchase price thereof to the payment of said purchase price, except only where the said property is in the hands of an innocent purchaser, for value, without notice of the existence of the claim for the purchase price.

"The general rule is, that property in legal custody is not subject to be seized by other judicial process; that when it is held under judicial process, it cannot be seized under other judicial process." *Bank v. Owen*, 79 Mo. 431. But this general rule, where it is necessary, must yield, in order for the right given by this statute to be enforced. And so we hold that personal property held under an attachment can be seized under an execution on a judgment against the purchaser for the purchase price of the property, unless, indeed, the attaching creditor can be held to be an innocent purchaser for value, etc.

The statute makes only one exception, that of an innocent purchaser, for value, without notice of the existence of the claim for the purchase money. Creditors are not named in the exception. We cannot enlarge the exception. Creditors are not innocent purchasers.

Before the court granted the motion of the Bolckow Milling Company, and made the order for the distribution of the proceeds of the sale of the flour in the hands of the sheriff, judgment had been duly entered in favor of said company against Young, the purchaser, for the purchase price of the flour. The said company was then entitled to an execution on such judgment. The issuance of an execution was unnecessary, because the flour had

been sold under an order of the court and the proceeds were in the hands of the sheriff, and the law does not require a vain act. The order of the court for the distribution of such proceeds took the place of an execution. It is thus unnecessary for us to discuss the question, whether, under this statute, personal property can be subjected to the payment of its purchase price by attachment. Attaching the property does not deprive the vendor of the right to subject it to the payment of its purchase price by execution on a judgment against the purchaser for the purchase price.

With the concurrence of the other judges in the result, the judgment is affirmed.

J. W. WOOD & Co., Respondents, v. W. E. HALL, GARNISHEE OF R. A. LOVE, Appellant.

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Kansas City Court of Appeals, June 30, 1886.

1. MORTGAGE—WHEN INVALID AS TO CREDITORS, UNDER SECTION 2496, REVISED STATUTES—WAIVER OF INVALID PROVISIONS.—Although a mortgage is invalid as to the *creditors* of the mortgagor, when it gives him the right to the *possession* of the stock of goods mortgaged, with the power to sell, *etc.*, being in violation of section 2496, Revised Statutes; it is, *notwithstanding* the illegal provisions, binding and valid between the mortgagor and mortgagee, and the parties to the mortgage have the right to *waive* and not to enforce those provisions. And the mortgagee might, with the *consent* of the mortgagor, take possession of the mortgaged goods, at any time before a *creditor of or purchaser from* the mortgagor had acquired rights to the stock of goods, with the same result. And if the possession is not taken with the *consent* of the mortgagor, but *against* his consent—as by an action of replevin, on the ground that the condition of the mortgage had been broken—it has the *same effect* as possession obtained by the mortgagor's consent. And possession thus taken cures the mortgage of the illegality.

2. COURTS OF APPEALS—TRANSFER OF CAUSE TO SUPREME COURT—

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CONSTRUCTION OF SECTION SIX, OF AMENDMENT TO STATE CONSTITUTION, CREATING THIS COURT.—Under section six (6) of the amendment to the constitution of this state, creating this court, where the decision of either of the courts of appeals is in *accordance* with the *last* previous ruling of the supreme court, on any question of law or equity, there is no authority for such court of appeals to certify and transfer the cause and transcript therein to the supreme court, because said decision may be in conflict with a *prior* ruling of the supreme court, which has not been expressly overruled. The *last* ruling of the supreme court is binding on both courts of appeals, and a decision by either of such courts, in *accordance* with such ruling, is the decision which must be rendered.

APPEAL from Jasper Circuit Court, HON. NOAH M. GIVAN, Judge.

Reversed and remanded.

Statement of case by the court.

This is a proceeding of garnishment on execution, against Hall, as garnishee of Love. A general execution was issued from the circuit court, on May 9, 1881, in favor of the plaintiffs against Love, and on May 10, 1881, Hall was summoned as garnishee on said execution, to appear at the June term, 1881, to answer interrogatories. On the eighteenth day of June, 1881, to the usual interrogatories filed by plaintiffs, the garnishee answered, denying all indebtedness, etc.

The plaintiffs' denial of the garnishee's answer, so far as it is material to here state, was as follows:

" * * * that at the time of the service of the garnishment on defendant Hall, he (defendant Hall) had in his possession and under his control in Webb City, Mo., a large stock of drugs, drug furniture, druggist's sundries, oils, paints, fancy goods, notions, books, paper, tobacco and cigars, and the proceeds thereof, the property of defendant Love, of the value of three thousand dollars; that defendant Hall got and took possession of said stock of drugs, etc., under a pretended mortgage, which said mortgage was fraudulent and void as to the creditors of said R. A. Love; that said mort-

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gage is of date ———, 1879, and is recorded in the recorder's office of Jasper county, Missouri, at page —, that said mortgage was, and is, fraudulent and void in this: that it provides that said Love shall remain in possession of said stock of drugs, etc., and sell the same at retail in the usual course of trade, and provides that said Love shall replenish and keep up said stock of drugs, etc., out of the sale therefrom, and further allows said Love to appropriate the proceeds from the sale thereof to his own use; and plaintiffs say that said Love, with the knowledge and consent of said Hall, did sell said stock of drugs, etc., at retail in the usual course of trade and appropriate the proceeds of said sale to his (Love's) own use and benefit; that said mortgage attempts to cover all additional and future acquired stock in replenishing and keeping up said stock of drugs, etc. That the debt for which plaintiffs obtained judgment against said Love was for goods, wares and merchandise bought by said Love on credit and placed in said stock of drugs, etc., and that a large proportion of said merchandise so bought was still in and with said stock of drugs, etc., undisposed of, when said Hall, forcibly took and got possession of said stock of drugs, etc., on the —— day of May, 1879. That said Hall knew that said Love was appropriating the proceeds of sales therefrom to his own use and benefit; that said Hall, since taking possession of said stock of drugs, etc., has sold and converted all of said stock of drugs, etc., and has the proceeds thereof in his hands. Plaintiffs pray judgment against defendant Hall for the amount of said judgment and costs and interest thereon."

The garnishee Hall replied to this pleading, denying each and every allegation therein contained.

The case was tried before the court without a jury.

For the purposes of this report we state the mortgage was as averred in the denial filed by plaintiffs to the garnishee's answer.

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In May, 1879, Hall, the garnishee, took possession of the stock of goods in controversy as mortgagee, by means of a writ of replevin. The replevin suit was decided in his favor. For the purposes of this report it may be stated that Hall still had possession of said stock of goods at the time that he was summoned as garnishee.

For the plaintiffs the court declared the law to be, "that the mortgage from Love to Hall, read in evidence, is void as to creditors of said Love, and the finding should be for plaintiffs."

From a judgment accordingly rendered in favor of plaintiffs the garnishee has appealed to this court.

PHELPS & BROWN, with JOSEPH CRAVENS, for the appellant.

I. The instructions for the plaintiffs *assumed* that the mortgage executed by Love to Hall, was void on its face, because it permitted Love to remain in possession of the mortgaged property and sell the same. The court erred in thus instructing, as the mortgagor was not permitted to sell or dispose of the goods *for his own use*, but was required to apply the proceeds of such sales to the payment of the debts secured by the mortgage. *Metzner v. Graham*, 57 Mo. 404. The cases of *Brooks v. Wiener* (20 Mo. 503), *Stanley v. Bunce* (27 Mo. 269), and *Billingsley v. Bunce* (28 Mo. 547), are distinguishable.

II. Where a chattel mortgage is given to secure a debt and the mortgagee takes *actual* possession under his mortgage, before any creditor of the mortgagor has acquired rights to the mortgaged property, the *invalidity* of the mortgage *before possession taken by* the mortgagee is wholly immaterial. *Greely v. Readiug*, 74 Mo. 309; *Nash v. Norment*, 5 Mo. App. 545; Jones Chatt. Mort. sect. 178.

III. The mortgage was valid *between the parties*, and the stipulations permitting the mortgagor to remain in possession and sell, did not render it void on its face,

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even as to creditors. Brooks v. Wiener, 20 Mo. 503; *Metzner v. Graham*, 57 Mo. 404; *Greeley v. Reading*, 74 Mo. 309.

IV. There can be no judgment against the garnishee until judgment against principal debtor. Sect. 2531, Rev. Stat.; Drake Attach. (4 Ed.) sect. 460. A garnishing creditor has no greater right than his debtor against the garnishee. Waples on Attachments & Garnishments, 194; *Nat. Bk. Mo. v. Staley*, 9 Mo. App. 146.

V. The garnishee's possession must be of such a character as to give the principal debtor the right to recover possession as owner; if *he* cannot regain his own, the garnishing creditor cannot reach a third party who is in possession. Waples Attach. & Garn. 195; *Hathaway v. Russell*, 16 Mass. 473. *Under no circumstances* shall a garnishee be placed in a worse condition than he would be in if *the action was being prosecuted by the principal debtor himself.* Drake on Attach. (3 Ed.) sects. 451, 452.

CRITTENDEN & McDOUGAL, for the respondents.

I. Where a conveyance of chattels provides that the grantor may not only retain possession of the things conveyed, but continue to sell and dispose of them in the ordinary course of business, *using the proceeds*, it is held void on its face as a conveyance to the grantor's use. 10 Cent. L. Journal, 281; *Weber v. Armstrong*, 70 Mo. 217; *Lodge v. Samuel*, 50 Mo. 204; *Billingsley v. Bunce*, 28 Mo. 547; *Zeigler v. Maddox*, 26 Mo. 475; *Robinson, Exec'r, v. Robards*, 15 Mo. 460.

II. Judgment against the principal debtor was sufficiently shown by the introduction of the execution as *prima facie* evidence of the existence of the judgment. The court had judicial knowledge of the judgment against the principal debtor, when it entered the judgment against the garnishee on the pleadings. The law presumes the rightful performance of duty by its officers. The motion for a new trial does not call the attention of

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the court to the fact that there was no evidence of a judgment rendered against the principal debtor.

III. A person engaged in traffic and indebted cannot make a valid conveyance in favor of one creditor, by which he shall possess a lien on all the chattels, which the debtor shall, from time to time, have on hand, allowing the latter to purchase and sell like an unqualified owner, the lien attaching only to what may be on hand at the time it is sought to be enforced. *Edgell v. Hart*, 9 N. Y. 217; *Mittnacht v. Kelly*, 46 How. Pr. Rep. 458; *Wood v. Lowry*, 17 Wend. (N. Y.) 492.

IV. This mortgage is void under section 2496, Revised Statutes, as the mortgagor not only remained in possession of the goods, but also used and consumed them, in paying family expenses, etc., and this with the mortgagee's knowledge and consent. This brings the deed in antagonism to the rights of creditors. *Lodge v. Samuels*, 50 Mo. 204. The terms of the instrument had been so changed and modified by the contracting parties as to subject it to the imputation of fraud in fact and in law, when involving the rights of other creditors of the mortgageor.

V. *Upon the evidence*, the court was justified in giving the plaintiff's and refusing the garnishee's instructions, as those given declare the law upon the only material point in the case, *i. e.*, the validity of the mortgage. All other points were secondary and of no importance to the issue, as fraud utterly subverts whatever is built upon it.

PHELPS & BROWN, and CRAVENS, in reply.

I. The mode of proof of a judgment is by the production of the record, or an exemplified copy thereof. Freeman on Judgments, sects. 407, 408; 1 Greenleaf on Evid., sect. 501.

II. The mortgage is not void on its face. The sale and disposal of the property was not for his own use,

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but to be applied to discharge of debts secured by it. *Metzner v. Graham*, 57 Mo. 404.

III. It is admitted that if Love had voluntarily turned over the goods to Hall (garnishee), then the question of the validity of the mortgage would not arise. The *taking actual possession of the goods* is the true ground, and is as effectual as if they had been turned over *voluntarily* by the mortgagor. *Greeley v. Reading*, 74 Mo. 309.

HALL, J.—For the purposes of this case, we shall assume that the chattel mortgage executed by Love to Hall the garnishee, was, as to the creditors of Love, void, on account of the power therein conferred upon Love to retain possession of the stock of goods, and to sell the same in the usual course of trade, etc.

But how does the invalidity of the chattel mortgage benefit the plaintiffs, under the facts of this case?

The mortgage was invalid as to the mortgagor's creditors because it was to his use, and, therefore, in violation of section 2496, Revised Statutes. The mortgage was to his use because it gave to him the right to the possession of the stock of goods, with the power to sell the same, etc. Had the mortgagor, immediately upon the execution of the mortgage, waived those provisions of the mortgage made for his use, and turned over the possession of the stock of goods to the mortgagee, would the mortgage have been invalid simply because it retained those provisions uncancelled? We think not. The retention of the stock of goods by the mortgagor was the very basis of the invalidity of the mortgage. Without such possession, the mortgagor could not have exercised the power to sell in the usual course of trade, etc. Had the mortgagor so transferred the possession of the stock of goods, there would have been nothing upon which the invalidity of the mortgage could have rested. By such transfer of the possession of the stock of goods

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all illegality would have been eliminated from the mortgage.

The mortgage was, notwithstanding the illegal provisions referred to, binding and valid, between the mortgagor and mortgagee. The illegal provisions, had they been enforced, would have vitiated the mortgage as to creditors of or purchasers from the mortgagor. But, surely, the parties to the mortgage had the right to waive and not to enforce those provisions. Had those provisions never been complied with, had the parties to the mortgage treated the mortgage as if it had not contained those provisions, had the parties to the mortgage in their acts obeyed, and not violated, the law, the mortgage would have been binding upon all.

It would not require a separate and distinct agreement between the mortgagor and the mortgagee, authorizing the mortgagor to take possession of the stock of goods as security for, or in satisfaction of, the mortgage debt. *Greeley v. Reading*, 74 Mo. 309; *Nash v. Norment*, 5 Mo. App. 545; Jones on Chattel Mortgages, sect. 178, and cases cited. The mortgage would have been binding upon all, had it not been for the illegal provisions. The parties to the mortgage could have cured it of the illegality by expressly eradicating therefrom the illegal provisions. They could also have effected the same cure by ignoring those provisions. Did the possession of the mortgage depend upon the illegal provisions of the mortgage, such possession, of course, would be illegal, and then it could properly be said that the possession could be no better than the warrant under which the possession was taken. But the possession of the mortgagee, in the case supposed, would be against and in conflict with the illegal provisions of the mortgage. Said possession would stand, not upon the illegal provisions of the mortgage, but in disregard of them. Had the mortgagor retained possession of the stock of goods his possession would have rested upon the illegal provisions, and he could not, by any conduct of his, have made his

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possession better than the warrant by means of which he held such possession.

The result would have been the same had the mortgagee, with the consent of the mortgagor, taken possession of the mortgaged goods at any time before a creditor of, or purchaser from, the mortgagor had acquired rights to the stock of goods.

In this case, the garnishee, who was the mortgagee, took possession of the stock of goods long before the plaintiffs acquired any right thereto. The possession, however, was not taken with the consent of the mortgagor. The mortgagor opposed the taking of such possession. But the possession was obtained by operation of law, in an action of replevin, on the ground that the conditions of the mortgage had been broken, and that the garnishee was, therefore, entitled to such possession. Possession thus obtained must have the same effect that possession obtained with the consent of the mortgagor would have had. The possession was taken in accordance with the terms of the mortgage. The conditions of the mortgage upon which the illegal provisions rested had been broken, and those provisions were as completely rescinded and eliminated from the mortgage as they could have been by the consent of the mortgagor. The mortgagor had forfeited all right to the benefit of the provisions of the mortgage made for his own use. Possession taken by the mortgagee, with the consent of the mortgagor, would have cured the mortgage of the illegality. Possession taken by the mortgagee, in accordance with the terms of the mortgage, on account of the forfeiture of the mortgagor's right to possession, also cured the mortgage of the illegality.

In this case, there was no pretense of any actual fraud on the part of the garnishee. The action of the court was based wholly upon the constructive fraud arising from the illegal provisions of the mortgage. Under the facts of this case, in our opinion, the judgment should have been in favor of the garnishee.

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Since writing this opinion I have for the first time seen the case of *Dobyns v. Meyer* (20 Mo. App. 67), decided by the St. Louis court of appeals. The court expresses the opinion in that case that the views herein set forth are erroneous, and are at variance with the well settled rule in this country outside of this state. The rule referred to is the rule laid down with so much force by Ryan, J., in *Blakeslee v. Rossman* (43 Wis. 116). The St. Louis court of appeals felt constrained, by the force of the opinion of the supreme court of this state, in *Greeley v. Reading*, *supra*, to render judgment in accordance with the views expressed in this opinion. But, on account of the case of *Armstrong v. Tuttle* (34 Mo. 432), which seems to be in direct conflict with *Greeley v. Reading*, and which was not expressly overruled in the latter case, and which might, therefore, have been overlooked by the supreme court, and on account of the importance of the question involved, and in order that the question might be authoritatively settled by the supreme court, the original transcript in *Dobyns v. Meyer* was certified to the supreme court for final determination. This action was had under section six, of the amendment to the constitution of this state, creating this court, which provides that "When any one of said courts of appeals shall, in any cause or proceeding, render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any of said courts of appeals, or of the supreme court, the said court of appeals must, of its own motion, pending the same term, and not afterward, certify and transfer said cause or proceeding and the original transcript therein to the supreme court, and thereupon the supreme court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process; and the last previous rulings of the supreme court on any question of law or equity shall, in all cases, be controlling authority in said courts of appeals."

Under said section, it seems to us, that where the

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decision of either of the courts of appeals is in accordance with the last previous ruling of the supreme court on any question of law or equity, there is no authority for such court of appeals to certify and transfer the cause and transcript therein to the supreme court, because said decision may be in conflict with a prior ruling of the supreme court, which has not been expressly overruled. The last ruling of the supreme court is binding upon both courts of appeals, and a decision by either of such courts, in accordance with such ruling, is the decision which must be rendered.

We feel called upon to make these remarks as explanatory of our action in not transferring the transcript in this case to the supreme court.

In view of the conflict between the different courts of this country, and the conflict in the views entertained by the appellate courts of this state, upon the subject under discussion, we cannot but feel a doubt as to the correctness of our conclusion. But, after mature consideration and reflection, we have arrived at that conclusion, and, for the reasons given, adhere to it as correct.

The judgment is reversed and the cause remanded. All concur.

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J. B. FLANNERY, Respondent, v. THE KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 30, 1886.

1. PRACTICE—DEMURRER TO EVIDENCE—NEGLIGENCE—CASE ADJUDGED. Where there was sufficient evidence to have warranted the jury in finding that the cow belonging to plaintiff was struck by one of defendants trains; yet there was no evidence tending to show any actionable negligence on the part of those in charge of the train; and no proof from which the jury could have inferred that the ser-

vants of defendant were negligent in not discovering the animal sooner,—the court should have sustained the demurrer to the evidence, interposed by defendant, in this case.

2. ——— SPECIAL VERDICT ON PARTICULAR ISSUES—ANSWERS OF THE JURY—EFFECT OF.—Where the jury, in answer to questions, professing to elicit specific answers as to particular issues, say, "we don't know," this is equivalent to finding that the facts were not satisfactorily proved by the plaintiff, upon whom rested the burden of proof (in this case), and entitled the defendant to a judgment on the special verdict.

3. ——— ——— CHARACTER OF QUESTIONS TO BE SUBMITTED—PURPOSE OF THE STATUTE.—The statute authorizing the submission of certain facts for the special finding of the jury, contemplates that the questions submitted should be limited to the material issues made in the pleadings, and the facts essential to support the verdict one way or the other, and the questions should be such as are intelligible to ordinary apprehension, and in such form as to admit of a categorical answer, under the evidence. The proper practice for taking advantage of the *abuse* of this statute, would be for the party objecting to state his objections at the time the questions are proposed for submission, and to except to the action of the court in overruling the objections.

4. PRACTICE—RULE FIFTEEN OF THIS COURT—RECORD.—Where the requirements of rule fifteen of this court are complied with by the appellant, and the respondent or defendant in error does not file any additional abstract, this court will accept that of the appellant or plaintiff in error as containing a correct statement of the record, and will not go behind this abstract to look into the transcript to see whether it and the abstract correspond. *Per Philips, P. J., and Hall, J.; Ellison, J.*, files *separate* opinion.

APPEAL from Platte Circuit Court, HON. GEORGE W. DUNN, Judge.

Reversed.

The case is stated in the opinion.

EDWARDS & ELLISON, and STRONG & MOSMAN, for the appellant.

I. The *first* instruction given for plaintiff was error. It left the jury to conjecture what acts or omissions constituted negligence. *De Witt v. Railroad*, 50 Mo. 302;

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Rains v. Railroad, 71 Mo. 164; *Goodwin v. Railroad*, 75 Mo. 73; *Yarnall v. Railroad*, 75 Mo. 575.

II. The *third* instruction for plaintiff was also error. It declared, in effect, that proof of the injury raised a presumption of negligence. This is a common law action; negligence cannot be presumed. *Swearingen v. Railroad*, 64 Mo. 73; *McPheeters v. Railroad*, 45 Mo. 22; *Lloyd v. Railroad*, 49 Mo. 199; *Meyer v. Railroad*, 35 Mo. 352. Besides, it contradicted defendant's *fifth* instruction, and emphasized the error.

III. The special findings were equivalent to a finding that plaintiff has not proved the negligence alleged in the complaint. *Morrow v. Commissoners*, 21 Kan. 484; *Railroad v. McCandliss*, 33 Kan. 366. They were *evasive* and will not support a general verdict. *Hopkins v. Stanley*, 43 Ind. 553.

IV. The motion for judgment on the special findings in defendant's favor should have been sustained. Laws of Mo., 1885, p. 214; *McGonigle v. Gordon*, 11 Kansas, 167. The motion *in arrest* should have been sustained. Cases cited *supra*. So, also, the motion for new trial should have prevailed. There should be final judgment here for defendant.

C. W. FREEMAN, for the respondent.

I. Plaintiff's *first* instruction was properly given. The issue was whether defendant's servants saw the animals, or, by the exercise of ordinary caution and watchfulness, might have seen them in time to have prevented the injury. The jury found this issue for the plaintiff. *Isbell v. Railroad*, 60 Mo. 475; *Kendig v. Railroad*, 79 Mo. 207; *Pryor v. Railroad*, 69 Mo. 215; *Cadmus v. Railroad*, 18 C. L. J. 13.

II. There being evidence to sustain the finding this court will not inquire as to the *weight* of evidence. *Hamilton v. Berry*, 74 Mo. 176; *Appleby v. Brock*, 76 Mo. 314; *Hodges v. Black*, 76 Mo. 537; *Grove v. Kansas City*, 75 Mo. 672.

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III. The *third* instruction given for plaintiff was proper under the evidence in the case, which clearly showed negligence. Negligence is the breach of a legal duty which results in an injury to others. The duty is measured by the exigencies of the occasion. *Railroad v. Jones*, 95 U. S. 439. And if *unusual* precautions are necessary to avoid accidents, the failure to use them would authorize the jury to infer negligence. *Karle v. Railroad*, 55 Mo. 483; *McPheeters v. Railroad*, 45 Mo. 22.

IV. In cases where what constitutes a proper rate of speed depends upon the length and character of a train, *the location and surroundings of the track and other circumstances*, and no law or ordinance regulating the speed is in evidence, *whether* the rate of speed is *dangerous* is a question of *fact for* the jury. *Frick v. Railroad*, 75 Mo. 596.

V. As regards the "special findings" of the jury, they are not inconsistent with the *general* finding—*the verdict*, as the evidence shows. The verdict is for the right party and there is no error of law.

PHILIPS, P. J.—This is an action to recover damages for killing plaintiff's cow, alleged to have been done by one of defendant's trains of cars. The accident occurred inside of the switch limits of the town of Parkville in Platte county, on the eleventh day of June, 1884. The charge is that the injury resulted from the negligence of defendant's servants in charge of the train in managing and running the same.

Judgment for plaintiff, from which the defendant prosecutes this appeal.

At the close of plaintiff's evidence, and again, at the close of all the evidence, the defendant interposed a demurrer to the evidence. This demurrer, we are of opinion, the court should have sustained. When the plaintiff rested, while it may be conceded there was sufficient evidence to have warranted the jury in finding that the cow

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was struck by some one of defendant's trains, yet there was not a particle of evidence tending to show any actionable negligence on the part of those in charge of the train. It did not even appear, at the close of plaintiff's evidence, that the engineer or fireman saw the cow before or at the time of the collision, or that they could have avoided the injury had they seen the cow. Nor was there any proof from which the jury, without the merest speculation, could have inferred that the servants of defendant were negligent in not discovering the cow sooner. There was clearly no case made out up to this point in the progress of the trial. *Lord v. Ry. Co.*, 82 Mo. 139.

The only remaining question, therefore, for determination is, did the defendant's evidence (which it unnecessarily introduced), so supplement the proof submitted by plaintiff as to supply the essential omission on the issue of negligence?

The evidence tended to show that the Missouri river at Parkville runs nearly south within a few feet of the main track of the defendant; its embankments are very high. On the west side of the defendant's track, from the Parkville depot to the bridge, there is a narrow strip of ground which comes to a point at the mouth of the ravine where the bridge is located. This tongue of land widens towards the depot, northward, to ten or twelve feet in breath; its width in dry land varies according to the rise and fall of the river. A switch extends along the east side of the main track about ten feet from it, from near the depot southward, and extends across the ravine on a separate bridge (trestle). On this switch track some of the witnesses testified they saw a freight (construction) train standing about five or six o'clock, A. M., on the morning of the accident. George Davis testified that the same train was standing at the same place all night. This train of freight (construction) cars formed a barrier to the east of the main track, so that cattle standing on the tongue of land ne

the bridge (trestle) could not pass across the main track eastward, and could only escape from their position by crossing the ravine at its mouth, or jumping into the river. At the time of the injury the water in the river was high and backed up the ravine. So that, as the witnesses testified, the cows could not cross at the mouth of the ravine. Thus, the river on the one side, the switch on the other, upon which was standing all night a construction train, laid up for the night, extending unbroken from near the south end of the depot to and across the trestle over the ravine, and the ravine spanned by an open trestle, formed a sort of V-shaped inclosure, the open end of which was at the depot, with the main track running through the middle. The engineer and fireman testified that they were at their posts of duty, and that the cattle were within the inclosure made by the river, cars, etc., and that the cattle were lying down in the shade of certain large cotton wood trees, making it difficult to see them on approaching. On approaching the station the engineer and fireman testified that the signal was given, and the train slowed until its speed was reduced to about six or eight miles an hour. On coming around a curve at this point the fireman called for a lookout, and the engineer then discovered the cattle, lying down. As soon as they got up he gave the whistle alarm. The cattle started for the culvert, so as to satify the engineer that a collision would likely occur as they emerged on the track. Being satified that he could not halt his train in time to avoid the collision, and that there was more danger to his train in colliding at the slow rate he was running, he put on the steam and knocked the cow into the river, where she was found the next morning.

This is the substance and effect of the evidence. Wherein there is a single fact to warrant the verdict of the jury, we are unable to discover. The case, as indicated by one of the instructions given and those refused, as well as the argument of respondent's counsel at this bar, was tried on the theory, that it was the duty of th

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engineer to have been on the lookout at that point for the presence of these cattle, and if he could have discovered them near the track in time to have stopped his train before the collision, the defendant is as much liable as if the engineer had wilfully run the cow down after discovering her on the track. This is not the law, as applied to the facts of this case. There was no evidence that the engineer knew that these cattle were in the habit of resting over night at this point. Nor is there any evidence that they ever were there before. It was a point where defendant was not required to fence its road. Railroad companies are not held to anticipate that cattle will be at such point in the night time. Nor are they required, under all circumstances, even on seeing cattle grazing or reposing near the track, to sound an alarm or to slow up the train. As to cattle, under circumstances like those disclosed by this record, no negligence is imputable to the engineer until he discovers that the cattle will likely go upon the track. *Young v. Ry. Co.*, 79 Mo. 336; *Milburn v. Ry. Co.*, 21 Mo. App., and *Sloop v. Ry. Co.*, 22 Mo. App. 593.

The evidence failing to show that the train could have been stopped in time to have averted the injury after the discovery of the danger, the plaintiff failed to make out a case.

I. Among the questions of fact, submitted for the finding of the jury, and the answers thereto, are the following:

"10. Could the train have stopped in time to have saved the animals, after the engine reached the point at which they could have been seen by the engineer? A. We don't know."

"11. Was the engineer at his post of duty, and discharging his duties with reasonable care, when they approached the point of injury in question? A. We don't know."

"12. How far were the cows from the engine, when first discovered by the engineer? A. We don't know."

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"13. If the engineer was guilty of any negligent act or omission in the running of his train, prior to seeing the animals on the track, which contributed to the injury, state what it was. A. We don't know."

"14. Did the engineer in charge of the train, after he became aware that the animals were upon the track, fail to take any precaution or fail to do anything, which a man of reasonable care and prudence, would have taken or done, under the surrounding circumstances, and which, if done or taken, would have prevented the injury? If so, state what it was. A. We don't know."

The answers made, "We don't know," were equivalent to a finding that the facts were not satisfactorily proven by the plaintiff, upon whom rested the burden of this proof; and entitled the defendant to a judgment on the special verdict. *Morrow v. Com'rs of Saline county*, 21 Kas. 484; *A., T. & S. F. Ry. Co. v. McCandliss*, 33 Kas. 366; *Hopkins v. Stanley*, 43 Ind. 554.

II. As the statute authorizing the submission of certain facts for the special finding of the jury is new in this state, we deem it well to say, at the outset, that this statute is not to be made a snare to entrap and mislead the jury, nor an instrument in the hands of the practitioner for cross-examining the jury on minor and unimportant details. The questions submitted should be strictly limited to the material issues made in the pleadings, and the facts essential to support the verdict, one way or the other. They should be as few in number as will attain the ends of justice, so as to avoid confusing the jury and leading them into unprofitable wrangling over non-essentials. And especially should the questions to be answered be intelligible to the apprehension of the average juror, and be in such form as to admit of a categorical answer under the evidence.

Some of the questions, other than the foregoing, submitted in this case, are violative of these rules. The proper practice for taking advantage of the abuse of this statute, in this respect, would be for the party objecting

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to state his objections at the time the questions are proposed for submission, and to except to the action of the court in overruling the objections. If, however, an issue of fact should thus be submitted to the jury outside of the pleadings, or wholly irrevelant and immaterial, the failure of the jury to make answer, one way or the other, or any finding they might make thereon, should be disregarded in rendering judgment on the finding.

It being clear, from the answers made by the jury to important questions of fact, that the plaintiff failed to make out a case against the defendant, the judgment should have been entered for the defendant. The judgment of the circuit court is accordingly reversed. Hall, J., concurs in the result, on the ground expressed under the second point of the opinion. Ellison, J., presents separate opinion.

ELLISON, J.—In this case, what purports to be a bill of exceptions, has been considered by the majority as a bill of exceptions proper, because it has been so considered by the counsel on either side. The fact is, the paper purporting to be a bill of exceptions is not signed by the judge of the trial court, and, therefore, is not a part of the record in the case. Sections 3635–3639, Revised Statutes; *State v. Jones*, 58 Mo. 506; *Smith v. Ry. Co.*, 55 Mo. 601. The abstract of the record which counsel are to present to this court, under our rule, *presupposes there is a record.*

Parties will not be permitted to fabricate a record. They cannot, by agreement, impose on the court, as a record, that which, by law, cannot be. They cannot, even by agreement, dispense with briefs and assignments of errors. *Snyder v. Hopkins*, 39 Mo. 418; *Dissee v. Frank*, 52 Mo. 551.

We cannot try a sham case because parties agree we may.

I deem the decision in this cause contrary to the decisions in *State v. Jones*, 58 Mo. 506, and *Smith v. Ry.*

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Co., 55 Mo. 601, and that the case should be certified to the supreme court.

PHILIPS, P. J., and HALL, J.—It is suggested by Ellison, J., since the opinion herein was written, that the transcript shows that what purports to be the bill of exceptions does not appear to be signed by the judge of the circuit court; and, therefore, we ought to treat the case as if no bill of exceptions were in the record. By rule fifteen, of this court, it is provided, in substance, that: In all cases the appellant or plaintiff in error shall file with the clerk of this court, on or before the day on which the cause is docketed for hearing, five copies of a printed abstract, or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order the points or legal propositions relied on, with citation of authorities, etc. The rule then provides that copies of this abstract, etc., shall be furnished to the opposite party, who shall, within eight days thereafter, deliver to the appellant or plaintiff in error a copy of his brief in response, with briefs and points relied on, "and such further abstract of the record as he may deem necessary," and shall file with the clerk said briefs, etc., before the hearing of the cause. Under this rule this court has repeatedly and uniformily held, that where the respondent or defendant in error does not file any additional abstract, we will accept that of the appellant or plaintiff in error, as containing a correct statement of the record, and that we will not go behind this abstract to look into the transcript to see whether it and the abstract correspond.

The appellant in this case complied with this rule. The respondent filed no counter abstract, controverting the correctness of appellant's abstract, in the particular in question. The abstract expressly states, on page twenty-

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three, that, "thereupon, in due time, the defendant (the appellant) filed its bill of exceptions." This was accepted as correct in considering the case, and, of course, the transcript was not looked to, any more than in any other case. And now, forsooth, by an accident, it is discovered after the opinion is written, that the bill of exceptions, as copied in the transcript, does not appear to have been signed by the judge, we are asked to hold there is no bill of exceptions.

The respondent, as already stated, made no objection to this recitation in the abstract; he made no point thereon in his brief and argument, but throughout, has treated the case as if the exceptions were duly taken and saved. To allow this point, raised for the first time after the hearing, by one of the court, would, in my opinion, be not only unjust to the appellant, but virtually destroy the purpose of rule fifteen. The record recites that the bill of exceptions was duly presented and signed by the judge, and is made a part of the record. It is quite clear, to my mind, that the omission of the judge's name at the bottom of the bill of exceptions, is a mere clerical mistake in transcribing the record by the circuit court clerk; and had the respondent made any question as to this fact in his brief in response, as he should have done, if any advantage thereof is to be taken, the probabilities are that the whole matter would have been rectified, by appellant, by asking for a *certiorari*, unless respondent had consented to treat the case as if the judge's signature was appended to the bill of exceptions. The acceptance, by respondent, of appellant's abstract, without objection on account of this matter, and treating the case throughout as if the bill of exceptions were regular, should be treated by this court as a waiver, and recognition by him of the fact that the omission of the judge's name was a mere clerical error.

It would now, after the submission of the case, be the grossest injustice to the appellant to allow this objection, raised by one member of the court, *sua sponte*.

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This bill of exceptions is not of the nature of a jurisdictional fact, which cannot be waived. It stands, in this respect, as any other matter, to be preserved in the bill of exceptions. This court cannot review the errors arising in the progress of the trial without a motion for new trial, calling attention of the trial court to such error. Yet, if the abstract of record furnished by the appellant showed that this motion was duly filed, overruled, and exception saved, and be not controverted by the respondent, and no point made thereon at the hearing, or in brief, this court would accept that as correct, and would not go to the transcript for the truth. So, if the abstract should set out the instructions, and no denial of their correctness should be made by respondent, we would accept the abstract as true. Any other construction of rule fifteen would practically annul it, and the court would have to go through every transcript in search of errors not relied on by the opposite party.

The opinion of Ellison, J., proceeds upon the assumption that the majority hold that a bill of exceptions not signed in fact by the judge, may become a part of the record by agreement of counsel. This is not the point. We are all agreed that a bill of exceptions must be signed by the judge before it is entitled to record. But the question here is one of practice, under the rules of this court, as to what is the evidence of what the record does contain? The rule says the abstract, on which the parties have agreed. The parties surely could come into this court and stipulate that while the transcript sent up here, through mistake of the clerk, omitted the signature of the judge, as a matter of fact the bill of exceptions was signed by the judge, and this court would accept this as correct, and dispose of the case accordingly, without a *certiorari*.

The effect of respondent's silence, and treating the case as if the bill of exceptions, as stated in the appellant's abstract, was regular, is equivalent to such stipulation. So we hold that no such snap judgment should

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be rendered against appellant as would result from the view of the minority of the court. In this opinion Hall, J., concurs.

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SARAH A. WILLIAMS ET AL., Plaintiffs in Error, v. THE JACKSON COUNTY PATRONS OF HUSBANDRY, AND JOHN P. JONES, Defendants in Error.

Kansas City Court of Appeals, July 10, 1886.

1. CORPORATIONS—TRANSACTIONS WITH STOCKHOLDERS AND DIRECTORS—HOW CONSIDERED BY THE COURTS.—A stockholder and director may contract with, and make loans to, the corporation, of which he is a constituent member, and the courts are open to him for the enforcement of such contracts as a stranger to the corporation. But, on account of his *relation* to the corporate body, *where the rights of third parties are concerned*, courts of equity will narrowly scan and closely scrutinize such transactions, and cast upon *such* creditor the *onus* of proving the *bona fides* of the debt. Such stockholder and director may also loan money to, and take security from, an *embarrassed* corporation, which will be upheld both in courts of law and equity. So corporations may make an assignment for the benefit of creditors pursuant to statutory regulation, and may, *in good faith*, prefer one creditor to another.

2. ——— ——— DIFFERENT RULE AFTER INSOLVENCY—TRUST FUND FOR BENEFIT OF ALL CREDITORS.—The application of these principles is restricted to a "going concern." After the directors have voted their concern to be insolvent, and have determined to wind up its affairs with a view to payment of its debts, they cannot turn over the assets to one of the directors in payment of his debt to the exclusion of the other creditors of equal right. Where such corporation has been declared insolvent by its own board of directors, and it ceases further to prosecute the object of its creation, except for the purpose of *administering its assets*, the directors take upon themselves, or are clothed with, the office of trustees for the assets, with the stockholders and creditors of the concern as *cestuis que trust*, and, therefore, cannot secure to themselves any advantage, by way of preference, over other creditors of equal right. While a creditor, as one of the *cestuis que trust*, may be a trustee, yet, he

has no power to *prefer* his own claim, but must *take equally with the others.*

3. —— PARTIES TO ACTIONS AGAINST—DEFECT OF PARTIES—CASE ADJUDGED.—A single creditor should be permitted to file a creditor's bill, as in this case, without having to ascertain who all the other creditors are, and secure their co-operation, or make them parties *nolens volens.* The other creditors might, if they desire, *intervene,* and receive of the fund distributed *pro rata,* but *unless* they do *voluntarily,* the creditor suing is entitled to the fruit of his victory. *In this case,* if defendant director is a *bona fide* creditor, the fund should be *ratably* distributed between him and the plaintiffs.

ERROR to Jackson Circuit Court, HON. F. M. BLACK, Judge.

Reversed and remanded.

Statement of case by the court.

The petition in this case is as follows: "Plaintiffs state that they are now, and were, at and prior to the dates herein mentioned, husband and wife, and that the defendant, the Jackson County Co-operative Association of the Patrons of Husbandry is now, and was at and prior to the time herein stated, a private business corporation, duly created and organized under and by virtue of the laws of the state of Missouri, and engaged in the business of buying and selling goods, wares, merchandise, produce, and all articles pertaining to a general mercantile and commission business, at the city of Independence, and county of Jackson. Heretofore, to-wit, on the twenty-fifth day of January, 1881, the defendant corporation was justly indebted to plaintiff Sarah A. Williams, in the sum of five hundred dollars, and on the twentiet day of November, 1883, the said Sarah A. Williams and her said husband obtained a judgment for the full amount of said indebtedness, and for costs of suit. Said judgment was duly rendered by the circuit court of Jackson county, at the City of Kansas, in favor of said Sarah A. Williams and Almeron C. Williams, and against said defendant corporation, for said sum of five

hundred dollars, together with —— dollars costs. Said judgment still subsists in full force and effect, and remains due and unpaid.

"Heretofore, to-wit, on the sixth day of June, 1881, while said indebtedness was still existing against said corporation and remained unpaid, the defendant, John P. Jones, was a stockholder in, and was duly elected a trustee and director of, said corporation, and it became his duty, with the other trustees and directors, to take charge of, manage and control the business of said corporation then being transacted, and he did, with the other trustees and directors, take charge of said business. At this time said corporation was indebted to said Jones for money loaned in the sum of five hundred dollars. While said Jones was such trustee and director, said corporation was insolvent, and on the twelfth day of August, 1882, said corporation by and through the act of its board of trustees, determined and resolved to close out the business of said corporation, and sell all of its stock and fixtures, collect accounts, and apply the proceeds to the payment of its debts. Accordingly, said corporation sold all of its goods then on hand for a large sum of money, viz., $2,000; and upon receiving the proceeds of such sale, said corporation, through its board of trustees and directors, paid out of such proceeds the sum of two hundred dollars to said trustee and director, J. P. Jones, in preference to the claims of other creditors, and to the exclusion of the debt and demand of this plaintiff then due and unpaid. The said Jones and the other directors and trustees then and there well knew that said corporation was insolvent and unable to pay all of its debts, and well knew that its assets and the money so paid to said Jones was a trust fund to be held by them for the benefit of this plaintiff as a creditor of said corporation.

"And on the second day of December, 1882, said corporation, through its trustees and directors, while it was insolvent, as aforesaid, and while its directors and said Jones well knew of such insolvency, intending to prefer

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said Jones as its creditor, turned over and delivered to said Jones a large number of book accounts, and notes, and bills receivable, then outstanding and due said corporation, to the amount of five hundred dollars, to said Jones, as collateral security for the debt of said corporation to said Jones. Said sum of two hundred dollars and said notes, accounts and bills receivable, were, at the time aforesaid, a part of the assets of said corporation, and at and prior to the time the same were delivered to said Jones, said corporation was wholly insolvent, and all of the assets of said corporation were a trust fund in the hands of its trustees and directors, and the preference given to said Jones, as aforesaid, was fraudulent, and void in law as against the claim of this plaintiff, a creditor of said corporation. Said Jones still holds and retains said portion of the assets of said corporation, and has converted the same to his own use, under color of said pretended and fraudulent preference, and refuses to apply the same to the payment of the just debts of said corporation, wherefore plaintiffs ask that the said pretended preference be set aside and held for naught, and said Jones be compelled to account for all assets and moneys received by him while trustee and director of said corporation, as aforesaid, and that he be compelled to pay the same into court, to be applied to the satisfaction of plaintiff's judgment against said corporation, and for such other and further relief as to the court may seem just and equitable."

To this petition defendant Jones demurred, on the ground that it did not state facts sufficient to constitute a cause of action, in that it appears, from the petition, that at the time the said corporation turned over the money, notes, and accounts, to said Jones, it was justly indebted to him in such sums.

The court sustained the demurrer, and plaintiffs declining to plead further, judgment was entered for defendant, from which plaintiffs prosecute this writ of error.

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J. V. C. KARNES and WASH ADAMS, for the plaintiffs in error.

I. The directors are agents with power to *carry on*, not to wind up, the corporate business. When the corporation ceases to be a "going concern," the function of the directors is at an end. At the moment of hopeless insolvency the interest of the shareholder vanishes, and that of the creditor attaches. *At this point* the directors cease to be agents, and if they still retain possession of corporate assets, they are regarded, in equity, as *trustees for the creditors*. Morawetz on Priv. Corp., sects. 240, 581; *Singley v. Insurance Co.*, 45 Mo. 110; *Eppright v. Nickerson*, 78 Mo. 484; *Kochler v. Hubby*, 2 Black (U. S.) 717; *Rollins v. Clay*, 33 Me. 132; *Abbott v. Railroad*, 33 Barb. (N. Y.) 580.

II. A corporation has no existence independent of its shareholders. The duties of the corporation are simply the duties of the persons who compose it. Defendant Jones was not only a director, but also a shareholder of the corporation. *He was the corporation.*

III. The officers of a corporation, even when it is a "going concern," can deal with it only *sub modo*. All business transactions between them are voidable, and are not upheld *unless* shown to be fair and free from suspicion. *Chouteau v. Allen*, 70 Mo. 338; *Patrick v. Boonville G. L. Co.*, 17 Mo. 469; *Lingle v. Hogan*, 45 Mo. 109; *Brewster v. Stratman*, 4 Mo. App. 41; *Smith v. Lansing*, 22 N. Y. 523; *McAllen v. Woodcock*, 60 Mo. 174.

IV. The capital of a corporation constitutes a *trust fund* charged primarily with the payment of the corporate debts. *Wood v. Dummer*, 3 Mason C. C. (U. S.) 308; *Eppright v. Nickerson*, 78 Mo. 490; *Powell v. Railroad*, 42 Mo. 68; *Howe v. Robinson*, 20 Fla. 352; *Adler v. Brick Co.*, 13 Wis. 57; *Jones v. Mfg. Co.*, 38 Ark. 25; *Sawyer v. Hoag*, 17 Wall. (U. S.) 621; *Haskell v. Sells*,

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14 Mo. App. 91; *Turnbull v. Lumber Co.*, 8 Am. & Eng. Corp. Cases, 268; *Railroad v. Howard*, 74 U. S. 392.

V. Mere insolvency does not destroy the power of management; nor is a corporation prohibited from preferring one creditor to another. But the test is whether the acts done are intended to further corporate business, or with a view to corporate dissolution. The power of management ceases at the point of *hopeless insolvency.* Morawetz on Priv. Corp., sects. 559–579.

VI. The directors of a corporation which has become hopelessly insolvent, remaining in possession of corporate assets, are *quasi* trustees thereof for the *equal* benefit of all the creditors. Morawetz on Priv. Corp., sect. 581; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; Thomp. on Liability, Officers, etc., Corporations, sect. 23, p. 397. And they cannot lawfully appropriate the corporate assets in payment of their own debts, to the exclusion of other creditors of the corporation. *Richards v. Insurance Co.*, 43 N. H. 263; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Marr v. Bank W. Tenn.*, 4 Cold. (Tenn.) 484; *Hopkins, etc., App.*, 90 Pa. St. 69; *Lamb v. Laughlin*, 25 W. Va. 300; *Foster v. Mullanphy P. W. Co.*, 16 Mo. App. 157.

VII. "Where like statutes (such as those of Missouri) prevail concerning dissolved corporations, the *insolvency* of the *concern known* to the *president* and *directors*, works a *practical dissolution*, and they must take the statutory consequences, and that is the only safety there is in regard to this peculiar class of corporations under the Missouri law." Per Treat, J., District Judge United States, in *Sprague Mfg. Co. v. Murphy Furnishing Goods Co.*, 26 Fed. Rep. 572; *Savings Association v. Kellogg*, 52 Mo. 590; *Perry v. Turner*, 55 Mo. 425; *Moore v. Whitcomb*, 48 Mo. 548; *Chouteau v. Allen*, 70 Mo. 336; *Homer v. Carter*, 17 Fed. Rep. 362.

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A. COMINGO, and YATES & WALLACE, for the defendants in error.

I. A corporation, even when in a failing condition, can make an assignment or prefer any one or more of its creditors to the same extent as an individual can, under like circumstances. *Shockley v. Fisher*, 75 Mo. 501; *St. Louis v. Alexander*, 23 Mo. 524; *Dana v. Bank*, 5 W. & S. 147; *Catlin v. Eagle Bank*, 6 Conn. 232; *Warner v. Mower*, 11 Vt. 390; *State v. Bank*, 6 Gill & J. (Md.) 219: *Ringo v. Brisco*, 13 Ark. 563; *Goodwin v. McGehee*, 15 Ala. 235; *Cary v. Gilis*, 10 Ga. 29.

II. The corporation has the right to prefer a stockholder, if a *bona fide* creditor. *St. Louis v. Alexander*, 23 Mo. 527; *Kitchen v. Railroad*, 69 Mo. 224; *Foster v. Mullanphy, etc., Co.*, 16 Mo. App. 150; *Buel v. Buckingham*, 16 Iowa, 284; *Smith v. Sheary*, 47 Conn. 45; *Ponderville Co. v. Clark*, 25 Conn. 101; *Sargent v. Webster*, 13 Metc. (Mass.) 497; *Whitwell v. Warner*, 20 Vt. 425; *Oil Co. v. Mabry*, 91 U. S. 587; *Burr v. McDonald*, 3 Gratt. (Va.) 216; *Stratton v. Allen*, 1 S. E. Green Ch. (N. J.) 232; *Dunscomb v. Railroad*, 84 N. Y. 199; *Planter's Bank v. Whittle*, 8 Va. Law Jour. 597; *Railroad v. Claghorn*, 1 Speers Ch. (S. C.) 562; *Poole & Jackson's Case*, 26 Eng. R. 142; *Hurts v. Brown*, 77 Ill. 226; Angell & Ames on Corp. (11 Ed.) sect. 191.

III. Being an officer in the corporation did not deprive Jones * * * of availing himself of his superior knowledge and the advantages of his position to obtain security for a payment of his debt. His advantage is one which results from his position; and is known to every person who deals with and extends credit to a corporation. *Buel v. Buckingham*, 16 Iowa, 284; *Whitwell v. Warner*, 20 Vt. 444; *Sargent v. Warner*, 13 Metc. (Mass.) 497.

IV. "A private person could make a transfer of all his property in payment of one creditor, if it was done in good faith. That a corporation could do like-

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wise, through the agency of its directors; that such disposition would be binding, and would *not have* the effect to end or *dissolve* the corporation is clear, upon the authorities." Per Dillon, J., in *Buel v. Buckingham*, 16 Iowa, 296. The doctrine of this case is approved and upheld in this state. *Kitchen v. Railroad*, 69 Mo. 242; *Lingle v. Ins. Co.*, 45 Mo. 109; *Eppright v. Nickerson*, 78 Mo. 484; *Chouteau v. Allen*, 70 Mo. 338; *McAllen v. Woodcock*, 60 Mo. 174; *Patrick v. Gas Light Co.*, 17 Mo. App. 569; *Foster v. Mullanphy, etc., Co.*, 16 Mo. App. 157.

V. If the directors of an insolvent company hold *all* the assets in trust to be distributed among *all* the creditors equally, then this action cannot be sustained. *That* would require a proceeding in equity by all the *cestuis que trust*, that is, all *the creditors*, to subject all the property to a *pro rata* distribution; while this is an action by *one* only, on the theory that the preference to Jones was fraudulent, and asking a judgment against him for the whole amount he received, *for plaintiff's use alone*. This is a denial of plaintiff's own position, that it is a *trust fund* for *equal* distribution among *all* creditors.

PHILIPS, P. J.—The question to be answered on this record is, can a managing director and stockholder in an insolvent corporation, after it is ascertained and officially declared by its managing board to be insolvent, and they resolve to wind up its affairs with a view of discharging its debts, as far as they may, be preferred as a creditor to the exclusion of other creditors of the concern? The trial court answered this question in the affirmative.

It may be conceded that the recognized doctrine is, that a stockholder and director may contract with, and make loans to, the corporation, of which he is a constituent member, and the courts are open to him for the enforcement of such contracts as to a stranger to the corporation. But, on account of his relation to the cor-

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porate body, where the rights of third parties are concerned, courts of equity will narrowly scan and closely scrutinize such transactions. They will so far look upon them with suspicion as to cast upon such creditor the *onus* of proving the *bona fides* of his debt. *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462, and cases cited.

It may be further conceded that such stockholder and director may, also, loan money to, and take security therefor from, an embarrassed corporation, which will be upheld both in the courts of law and equity. This should be so, as such officers often come to the aid of embarrassed corporations and lend them money to keep them going.

It may be further conceded that for civil purposes, corporations are deemed persons, and may make an assignment for the benefit of creditors, pursuant to statutory regulation. Nor do we purpose, by anything said in this discussion, to deny the right of an embarrassed corporation, in good faith, to prefer one creditor to another, as the result of securities given him under proper circumstances.

It will be found, generally, that when courts have spoken thus, it is in respect of what is sometimes termed, "a going concern;" a corporation doing business, though crippled and embarrassed, yet has vitality and hope in it. But, after a careful review of the multitude of authorities bearing on this question, and looking to the reason and justice of the matter, I am unable to recognize the right or policy of directors, after they have voted their concern to be insolvent, and determined to wind up its affairs with a view to the payment of its debts, to turn over its assets to one of its number in payment of his debt, to the exclusion of the other creditors of equal right.

At common law, the dissolution of a corporation operated an extinguishment of its debts. Such an outrage upon common right called into action the interposition of the courts of equity, which declared the

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assets of such corporations to be a trust fund for the benefit of all the creditors, and it would follow the funds into whosesoever hands they passed, unless impressed with some superior equity in the hands of such third party.

This doctrine grew up out of the very necessities of the anomalous character of these artificial beings, these legal entities. While possessing many attributes in common with natural persons, their constituent members are not liable for the corporation debts and undertakings. They act and move through their agents, their officers, who must be regarded as trustees for the stockholders, and for the creditors, *sub modo.*

The courts early held that the assets of such corporations were so far impressed with the character of a trust fund that the board of directors could not give them away, nor distribute them among the stockholders, to the prejudice of the corporation creditors. And, while recognizing the existence of the legal title to such property to be and remain in the corporation, as such, and without trenching upon the right of management of the funds by the directory, or in any degree breaking in upon and striking down its autonomy, the rule of equity has become paramount, in most of the courts of this country, and in the higher courts of England, that where such corporation has been declared insolvent by its own board of directors, and it ceases to further prosecute the object of its creation, except for the purpose of administering its assets, the directors take upon themselves, or are clothed with, the office of trustees for the assets, with the stockholders and creditors of the concern as *cestuis que trust.*

I know there are authorities of high character, which, in effect, hold that such corporations, through its directors, have the same right as natural persons to make preferences among their creditors, "of particular creditors or classes of creditors." *Ringo v. Brisco*, 13 Ark. 563; *Catlin v. Eagle Bank*, 6 Conn. 232; *Buell*

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v. Buckingham & Co., 16 Ia. 284; *Whitwell v. Warren*, 20 Vt. 452; *Sargent v. Webster*, 13 Met. 497; and, perhaps, others.

Morawetz, in his admirable treatise on Private Corporations (section 582), says: "It is submitted that this doctrine is wholly indefensible upon principle. It seems to have been first started in *Catlin v. Eagle Bank* (6 Conn. 232), a case in which the fundamental rule that the assets of an insolvent corporation constitute a trust fund, pledged for the security of creditors was denied. It is a doctrine which is at variance with the whole theory of the law concerning the rights of creditors of insolvent corporations, and it is contrary to the plainest principles of justice."

The seemingly broad doctrine announced in *Catlin v. Eagle Bank*, has been explained away to some extent in the later case of *Crandall v. Lincoln* (52 Conn. 108–9). O. the case of *Sargent v. Webster* (13 Met.) it is enough, for the purposes, of this discussion, to say, it is not in conflict, necessarily, with the conclusion we shall reach in this opinion; for the preferred creditor there was not a director, and did not sustain the relation of trustee of the assets for the benefit of all the creditors. We concur in the justice of the criticism made of the case of *Buell v. Buckingham & Co.*, so much relied on by defendant, made by Mr. Justice Woods, of the supreme court of the United States, in *Lippincott v. Shaw Car Co.*, reported in the twenty-fifth Federal Report, 577: "It may be said of the first (case, *supra*), in the language of one of the justices who joined in the decision, 'that there is no evidence that the corporation is insolvent, nor is there any evidence that all of the property of the corporation was taken.'" And this judge, in the same connection, speaking of other cases, says: "The preferences were given in fulfillment of agreements to indemnify the directors, who, upon the faith of such agreements, had assumed liabilities for, or given credit to, their respective corpora-

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tions. In other cases the preferences were given to stockholders who were not directors or managers."

It is now a conspicuous fact, in the history of the progress of equity jurisprudence, throughout England and America, that the courts are generally yielding to the principle, that the directors and officers of an insolvent corporation are trustees of the assets for the benefit of all the creditors, and must manage and distribute such assets, after the ascertained and confessed insolvency, as any other trustees and agents of a trust fund; and, therefore, they cannot secure to themselves any advantage, by way of preference, over other creditors of equal right. Morawetz Priv. Corp. 579; *Marr v. Bank*, 4 Cold. 471; *Koehler v. Iron Co.*, 2 Black 715; *Curran v. Arkansas*, 15 How. 306; *Richards v. Insurance Co.*, 43 N. H. 263; *Bradley v. Farwell*, 1 Holmes, 433; *Drury v. Cross*, 7 Wall. 299; *Gas Light Co. v. Terrell*, L. R. 10 Eq. 168; *Robbins v. Embry*, I. S. M. & M. Ch. 207, 258, 264; *Haywood v. Lincoln Lumber Co.* (Sup. Crt. Wis.) 26 N. W. Rep. 184; *Lippincott v. Shaw Car Co.*, *supra*; *Hopkins et al. Appeal*, 90 Pa. St. 60; *Lamb, Trustee, v. Laughlin*, 25 W. Va. 300.

The principle upon which this doctrine rests is admirably stated by Milligan, J., in *Marr v. Bank*, *supra*: "By the insolvency of the bank the corporation is rendered incapable of pursuing the objects for which it is created, without defrauding the public and existing creditors. Its officers or agents properly ceased to use its franchise after the insolvency was ascertained; but their responsibility as to assets did not cease. They continued to hold them as before; not for themselves or for the use and benefit of the stockholders, but for the creditors of the corporation. After the insolvency of the corporation, although the legal ownership of the assets may continue as before, the beneficial interest of the stockholders clearly no longer exists, as a state of insolvency presupposes that the capital and assets are insufficient to meet its liabilities. The stockholders.

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having incurred no personal liability for the debts of the corporation, have, in point of fact, no interest in the disposition of the assets of the bank after its insolvency. In equity, as well as at law, the beneficial interest therein belongs to the creditors. The capital is the fund they trusted, and to which, with the after acquired property or assets of the corporation, they can alone look for indemnity. Both stand pledged for the payment of the corporation debts, and a court of equity will follow them into the hands of stockholders or other persons receiving them with notice, for the benefit of the creditors."

Even those judges who do not go to the extent above indicated, are forced to admit that upon the insolvency of such a corporation, and its cessation from business, its assets become a trust fund in the hands of the directors for the benefit of the creditors. When it is conceded that equity thus affixes to them the character and office of trustees of a trust fund, I am unable, on principle, to distinguish their trusteeship and agency from that of any other trustee or agent. The well recognized rule is, that when a trustee or agent receives money, generally for various creditors of equal dignity and right, to each of whom he is under the same legal and equitable obligation, he must apply the fund ratably among all the creditors. And it is equally clear law, that if such trustee or agent be himself a creditor he cannot apply the trust fund to the payment of his own claim to the exclusion of the other creditors. He must pay all *pari passu*. *Colby v. Copp*, 35 N. H. 434; *Richards v. Insurance Co.*, 43 N. H. *supra*.

It is a recognized rule of the doctrine of trusts, that while a creditor, as one of the *cestuis que trust*, may be a trustee, yet he has no power to prefer his own claim, "but must take equally with the others." 2 Perry on Trusts, sect. 596; *Downy v. Cross*, 7 Wall. 299.

Whilst entertaining the highest respect for the learning and judicial mind of Judge Dillon, I am constrained to dissent from his declaration, in *Buell v. Buckingham*

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& Co., *supra*, that in the race of diligence among creditors such a director of a bankrupt concern may avail himself of his superior knowledge derived from *within* to secure himself over other creditors, with the co-operation of his associates. In this announcement he loses sight, it seems to me, of the fundamental principle underlying the office of a trustee of a trust fund. The gluttonous idea, "first come, first served," whatever be its merits elsewhere, certainly has no place in the forum of conscience in determining the legal ethics and duties by which a trustee is to be governed in the management and distribution of trust funds. He must act with absolute impartiality. All the beneficiaries of the trust fund must be served alike and at the same time.

As said by the English equity court, in *Gas Light Co. v. Terrell*, *supra*, in speaking of the right of such directors to avail themselves of their official information; while a preference to a stranger might be only an undue preference, that of a director who was also a creditor, introduced the added element of a taint of fraud and a breach of trust. "Equitable assets shall be distributed equally and *pari passu* among all the creditors, without any reference to the priority and dignity of the debts." 1 Story Eq., sect. 544.

There may be *dicta* and adjudications of our supreme court recognizing, in general terms, the right of a failing corporation to prefer creditors, and one of its own officers under certain circumstances. *City of St. Louis v. Alexander*, 23 Mo., separate opinion of Ryland, J.; *Kitchen v. Railroad Co.*, 60 Mo. 222–244, *et seq.* But that court has not held, under circumstances like these disclosed by the petition in this case, that such preference would be upheld. In the later case of *Eppright v. Nickerson* (78 Mo. 490), the court say: "the capital stock of a corporation is a trust fund held by the corporation for the benefit of all its creditors."

Conceding this, after the directors have officially an-

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nounced the insolvency of the corporation, and a cessation of business, except for the purpose of collecting its assets, the court, when the proper case arises, must yield to the irresistible logic of the true office of such trustee, and hold that he cannot thereafter secure to himself an advantage over other beneficiaries of the trust estate.

This doctrine results almost necessarily from the rapid growth, pervasiveness, and anomalous character of these artificial agencies. The rules of law and equity must be adjusted so as to meet the exigencies of their being. The enlargement of equitable rules and principles must be allowed in their application to new necessities and conditions constantly springing out of the activities and developments of the arts and commerce of advancing civilization.

As said by Mr. Justice Miller, in *Sawyer v. Hoag* (17 Wall. 620): "When we consider the rapid development of corporations, as instrumentalities of the commercial and business world, in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern; for the occasion for it is modern; for the occasion for it could not sooner have arisen."

My conclusion is, that the payment of the money, and transfer of the notes and accounts by the directors to the defendant Jones was an invalid preference, and should be set aside.

II. The point is raised, on this hearing, by the defendant, that the demurrer was, at all events, properly sustained, because all the creditors of the corporation are not made parties to this action. No such objection was raised by the demurrers. Where a defect of parties is apparent on the face of the petition objection therefor must be raised by demurrer. If the defect does not so appear it should be raised by answer. But unless so raised the objection, on appeal or writ of error, will

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be deemed to have been waived. *Walker v. Deaver et al.*, 79 Mo. 672; *State ex rel. v. True*, 20 Mo. App. 176.

But as this question will have to be met, perhaps, on a re-trial of the case, we should now determine it. We can see no reason why a single judgment creditor should not be permitted to file a creditor's bill without having to ascertain who all the other creditors are, and secure their co-operation, or make them parties, *nolens volens*.

The law protects and encourages the vigilant. The other creditors might, if they desire, intervene, and the proceeds of the fund, when restored by the decree of the court, would be distributed equally, *pro rata*, among all the creditors. But unless they come in, voluntarily, the plaintiff, by whose vigilance and diligence the misapplied fund is restored, is entitled to the fruit of his victory. Morawetz on Priv. Corp., sect. 584, and citation in note 1. If, however, the defendant, be a *bona fide* creditor, he being a party to the action, the court should decree that the fund in his hand be ratably distributed between him and the plaintiff. *Lippincott v. Shaw Car Co., supra; Rieper v. Rieper*, 79 Mo. 360-361.

Hall, J., concurring, the judgment of the circuit court is reversed, and the cause remanded. Ellison, J., absent.

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35	626
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38	530
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57	580
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91	479

RUDOLPH W. BACKENSTOE, Respondent, v. THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, December 8, 1885.*

1. PRACTICE—OBJECTIONS TO EVIDENCE NOT URGED IN APPELLATE COURT—WAIVER OF.—Although specific objections be made to the introduction of evidence in the court below, yet if these objections are not made or urged in this court, they will be treated as abandoned. And where objections are made here, for the first time, to the competency of evidence, they are unavailing. "By taking specific grounds of objection which are wrong, the party is always considered as *waiving* the true ground; and, in effect, therefore, as not objecting at all." *Dunham v. Simmons*, 3 Hill (N. Y.) 610.

2. NEGLIGENCE—EFFECT OF VIOLATING ORDINANCE, AS REGARDS PECUNIARY LIABILITY FOR INJURY.—"Negligence may be asserted as a matter of law, where there has been a breach of law, or a city ordinance." *Norton v. Ittner*, 56 Mo. 352. The imposition of a fine, by an ordinance, for running a train at a rate of speed prohibited by the ordinance, did not relieve the one so violating the ordinance of pecuniary liability for an injury done to another by so doing. On the contrary the imposition of the fine prohibited the act, and such prohibition by a valid ordinance, rendered such an act negligent *per se;* and the one doing the act, liable for all injury caused thereby.

3. ——— PRACTICE—EVIDENCE—CASE ADJUDGED.—Where all the circumstances connected with the striking of the animal by defendant's train, including the illegal rate of speed at which said train was running, were in evidence, the trial court *properly* submitted to the jury the question as to whether or not the animal was struck by reason of such illegal rate of speed.

4. DAMAGE ACT—WHERE SUIT MUST BE INSTITUTED, IF BEFORE JUSTICE—JURISDICTION.—It has been uniformly held, since the decision in *Hansberger v. Railroad*, 43 Mo. 196, that the action under the double liability section of the statute (sect. 809, Rev. Stat.),

[* Certified copy of this opinion was not delivered to the *reporter* until *September* 2, 1886; after the matter for the twenty-second Missouri Appeals was *in press. Reporter.*]

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when begun in a justice's court, must be instituted before a justice of *the township in which the injury occurred.* It is a jurisdictional fact, and must appear affirmatively of record; and this fact is essential to be averred and proved at the trial. *Nall v. Railroad,* 59 Mo. 112, *criticized.*

APPEAL from Carroll Circuit Court, HON. JAMES M. DAVIS, Judge.

Certified to Supreme Court of this state as provided in section six of the constitutional amendment creating the Kansas City court of appeals. Judge Hall, being of opinion that the conclusion reached by the majority of the court is in conflict with the decision in *Nall v. Railroad*, 59 Mo. 112, and that said decision has not been directly overruled.

Statement of case by the court.

This was an action instituted before a justice of the peace in Carroll county, Missouri, on the second day of August, 1882, to recover of defendant the sum of one hundred dollars damages, for the alleged killing of a horse on defendant's railroad by one of its trains, on the sixth day of November, 1881, in the township of Egypt, in Carroll county, and within the corporate limits of the town of Norborne. Judgment by default was had against defendant. Upon an appeal to the circuit court a trial *de novo* was had. Upon this trial evidence was introduced by plaintiff, tending to show that he was the owner of the mare killed; that she was worth one hundred dollars; that she was killed about three hundred yards west of the depot at Norborne and about five yards east of the public crossing, and within the defendant's switch limits, and within the limits of the town of Norborne; that the public crossing near which the mare was killed was a very public crossing, over which most of the trade going to Norborne crossed; that three horses were standing about thirty or forty yards north of defendant's track as the defendant's train

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approached; that they all "started and ran south of the track at the crossing, two of them got across safe, this mare being behind was cut off by the train and turned east, she ran a few yards on the track before the engine struck her;" that the train was running at the rate of fifteen or twenty miles an hour; that the population of Norborne was, at the time, one thousand or twelve hundred, and that Norborne was organized as a city of the fourth class. The population of Norborne and its organization as a city of the fourth class were testified to orally by plaintiff's witness, Van Trump, without objection by defendant.

Plaintiff offered in evidence section 18, of ordinance number 17, governing the town of Norborne. To the introduction of which ordinance in evidence, the defendant objected for the following reasons:

"Because a city of the fourth class has no authority to pass ordinances regulating the speed of cars.

"Because said ordinance was unreasonable and only subjects the conductor, or engineer, or the person in charge of the train, to a fine."

The defendant's objection was overruled and the said section of the said ordinance was read in evidence.

Said section 18, as read by plaintiff, was as follows:

"Section 18. Every conductor or engineer or other person in charge of any railroad train passing through the city of Norborne, who shall run or cause the same to be run at a greater speed than four miles per hour, while passing through the corporate limits of the city, shall be fined not less than five, nor more than ninety dollars for every such offence."

The defendant unsuccessfully demurred to the plaintiff's evidence. The defendant introduced no evidence.

For the plaintiff the court gave the following instructions:

"1. If the jury find for plaintiff, they will assess as damages the value of the animal at the time of the killing, not more than one hundred dollars."

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"2. If the jury find from the evidence that the animal in question was struck by the locomotive or train of defendant running on its road through the town of Norborne, that the train was running at a greater rate of speed than is allowed by the ordinance of said town, to-wit: four miles per hour, *and that the animal was struck by reason of such excessive rate of speed*, then they will find for the plaintiff."

For the defendant the court gave the following instructions:

"1. The court instructs the jury that the burden of proof is upon plaintiff and it is for him to prove his case by a preponderance of evidence."

"2. If the jury believe from the evidence that if the train that killed the horse had been run at a rate of speed not greater than four miles an hour, the horse would nevertheless have been killed at said time and place, then they are instructed that the verdict must be for the defendant."

"4. Although the jury may believe from the evidence that the horse in question was the property of the plaintiff, and that it was run over and killed in the town of Norborne by the engine or cars of defendant, and that the train that thus killed the horse was at the time and prior thereto, running through said town at a rate in excess of four miles an hour, yet the jury are instructed, that the proof of each and all of the foregoing facts will not entitle the plaintiff to a verdict, but the jury must further find from the evidence, that the horse was killed directly in consequence of the fact that the engine and train was run at the rate in excess of four miles an hour and unless the jury so find from the evidence, they are instructed that their verdict must be for defendant."

Judgment was rendered in favor of the plaintiff. The case is here on appeal by defendant.

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GEORGE S. GROVER, for the appellant.

I. While it was *averred* in the complaint that the animal was killed in Egypt township, Carroll county, Missouri, such fact *was not proved*. It was shown that the animal was killed in the town of Norborne, but it was *not* shown that such town was in Egypt township, in Carroll county. This was a fatal omission, as the place where the killing occurred must be shown in order to confer jurisdiction upon the justice, or upon the circuit court on appeal. No venue was shown, and no jurisdiction was acquired by the court, and the proceedings were void. The court cannot take notice of such jurisdictional facts. *State v. Metzger*, 26 Mo. 65; *Hansberger v. Railroad*, 43 Mo. 196; *Iba v. Railroad*, 45 Mo. 469; *Haggard v. Railroad*, 63 Mo. 302; *Barnett v. Railroad*, 68 Mo. 56. And this question may be raised for the first time in this court. *Barnett v. Railroad, supra.*

II. The court erred in permitting the alleged ordinance of the city of Norborne to be read in evidence, without proof of its passage by the board of aldermen, in the manner required by the statute. Until such proof was made the ordinance was not admissible in evidence. Sects. 4946 and 4950, Rev. Stat., p. 984; *Inhabitants of Butler v. Robinson*, 75 Mo. 192; *City of Alton v. Ins. Co.*, 72 Ill. 328; *Schott v. People*, 89 Ill. 195.

III. Nor was it competent to prove *by parol* that Norborne was incorporated as a city of the fourth class. Such fact, if true, could only be shown by the record unless the loss or destruction of the record had been proved. Sects. 4385, 4946, 4950, Rev. Stat.; *Volger v. Heidel*, 60 Mo. 284; *Washington Co. v. Railroad*, 58 Mo. 372; *Maupin v. Franklin Co.*, 67 Mo. 327; *Brackett v. Brackett*, 61 Mo. 221; *Mabley v. Nave*, 67 Mo. 327; *Schott v. People*, 89 Ill. 195.

IV. The demurrer to the evidence should have been sustained. The burden of proof was upon the plaintiff

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to show that the actual negligence of defendant caused the injury, and no attempt was made to prove such fact, or, that the speed of the train caused the injury. Under such circumstances, it was the duty of the trial court to instruct the jury to find for defendant. Such has been the uniform rule in this state as to statutory actions; and it applies with equal force to this action, as the plaintiff relies for recovery upon a municipal by-law which is in the nature of a penal statute. *Holman v. Railroad*, 62 Mo. 562; *Wallace v. Railroad*, 74 Mo. 594; *Braxton v. Railroad*, 77 Mo. 555; *Stepp v. Railroad*, Supt. Ct. Mo. (not yet reported).

V. There was no authority given by the *ordinance* to institute or maintain this action against defendant. It simply contemplates a criminal proceeding against the men named in the ordinance as for a misdemeanor, and cannot be construed to authorize a civil action sounding in tort, or to create a pecuniary liability. *Dunlap v. Knapp*, 14 Ohio St. 64; *Tingle v. Railroad*, 60 Iowa, 333.

VI. The court erred in giving and refusing instructions.

HALE & SONS, for the respondent.

I. If it is stated in the petition that the killing was done in the township where the suit was brought, it is sufficient to give the court jurisdiction. The *statement* says that the killing was done in the town of Norborne, in Egypt township, and within the switch limits. The *proof* is that the killing occurred in the town of Norborne and within the switch limits; it will be assumed, after verdict, that the killing was done in the township. The court acquires jurisdiction by the allegation in the petition. The jury were authorized to assume from the facts proven that the killing was in the township, especially where no question of the sort is raised. *Barnett v. Railroad*, 68 Mo. 56.

II. The objection to the reading of the ordinances

of the town of Norborne and to the proof that it was a city of the fourth class, were not made in the court below, and cannot be made now for the first time. Parol testimony that the town of Norborne was *acting* as a city of the fourth class is *prima facie* sufficient, even if the objections had been made in the court below; and our statutes make the printed copy of the ordinances of a town purporting to be published by authority, etc., evidence. See sect. 2287, Rev. Stat.

III. The demurrer to the evidence involves the whole case on plaintiff's testimony, and if there was any evidence to sustain plaintiff's case, the court did right in refusing it.

IV. A municipal ordinance, framed or enacted by a municipal corporation, regulating the rate of speed through such town or city, is valid, if there were provisions in the law authorizing it, and a violation of such ordinance is negligence *per se*. *Powell v. Railroad*, 76 Mo. 80; *Mahon v. Railroad*, 64 Mo. 267. Section 2940, Revised Statutes, confers ample authority on cities of the fourth class to pass such ordinances. The fact that the ordinance imposes a *fine* for its violation by the conductor or engineer certainly does not make the act of violating the ordinance (by running at a rate of speed prohibited by it), any the less unlawful. The fact that a fine is imposed makes it unlawful.

V. The evidence in this case is sufficient to show *actual negligence* in the running of the train, which contributed to and caused the death of the animal.

GEO. S. GROVER, *in reply*.

I. The transcript must show that the killing occurred within the township where the suit was brought. And this objection may be raised for the first time in this court. *Barnett v. Railroad*, 68 Mo. 56. In order to confer jurisdiction it is essential to aver and prove this fact. *Mitchell v. Railroad*, 82 Mo. 106.

II. In order to lay the foundation for the introduc-

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tion in proof, of a municipal ordinance, it must be shown that the municipality had the authority to pass it. While no objection was made to the parol evidence offered the demurrer to the evidence raised the entire question as to its sufficiency.

III. The burden of proof in this action was upon the plaintiff to show that the actual negligence of defendant caused the injury. Where the evidence is insufficient to support a verdict the trial court should direct a verdict for defendant. *Powell v. Railroad*, 76 Mo. 84.

I.

HALL, J.—The defendant asks that the judgment of the circuit court be reversed for the reason that it was not shown by the evidence that the horse was killed in Egypt township, the township in which the suit was brought.

The statement alleged that the horse was killed within defendant's switch limits, in the town of Norborne, in Egypt township, in Carroll county. The evidence showed that the horse was killed within the switch limits, in the town of Norborne. The evidence was sufficient to authorize the jury to infer that the horse was killed in Egypt township, and in Carroll county. I thus hold, controlled, as I feel myself to be by the authority of the case of *Nall v. Railroad* (59 Mo. 115); in which case Wagner, J., said: "The second instruction," asked by defendant and refused by the court below, "require that it should affirmatively appear that the injuries were inflicted in Gallatin township. The place where the killing or injury happened was a jurisdictional fact, and to be ascertained by proof like any other fact. The petition [statement before the justice] stated that it took place in Gallatin township. This gave the justice of the peace jurisdiction of the case, and the evidence showed at what point it hap-

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pened. The question was for the triers of the fact, and we will not interfere."

II.

In this court the defendant makes certain points which it is not in a position to make. In the court below the defendant made two specific objections to the introduction in evidence of the ordinance read by plaintiff. Those objections are not made or urged in this court, and will be treated as abandoned by the defendant. But objections other than those just referred to, are made here by defendant, for the first time, to the competency of said ordinance as evidence. Those objections cannot now be made by defendant. "By taking specific grounds of objection which are wrong, the party is always considered as waiving the true ground; and, in effect, therefore, as not objecting at all." *Dunham v. Simmons*, 3 Hill, 610. Nor can the defendant for the first time object to the competency of the parol evidence, introduced by plaintiff, that the town of Norborne was organized as a city of the fourth class. No such objection was made in the trial court. None can be made in this court.

III.

"Negligence may be asserted as a matter of law, where there has been a breach of law or a city ordinance." *Norton v. Ittner et al.*, 56 Mo. 352; *Karle v. Railroad*, 55 Mo. 476.

Section 18 of the ordinance read, prohibited the running of a railroad train through the corporate limits of Narborne at a greater rate of speed than four miles per hour, by imposing a penalty upon any one so doing. The imposition of a fine by the ordinance, upon any one for so running a railroad train, did not relieve such one of pecuniary liability for an injury done to another by so doing. But, on the contrary, the imposition of the fine prohibited the act to be punished by the fine; and the

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prohibition of the act, by a valid ordinance, rendered such an act negligent *per se*, and the one doing the act liable for all injury caused thereby. Cases cited above.

IV.

The defendant contends that, "There was no proof whatever that the animal was struck by reason of the excessive rate of speed." On the contrary, all the circumstances connected with the striking of the animal by defendant's train, including the illegal rate of speed at which said train was running, were in evidence, and the trial court properly submitted to the jury the question as to whether or not the animal was struck by reason of such illegal rate of speed. *Apitz v. Railroad*, 17 Mo. App. 419.

Judges Philips and Ellison concur, except as to the first point, from which they dissent, as explained in their separate opinion attached hereto.

SEPARATE OPINION OF THE MAJORITY OF THE COURT BY PHILIPS, P. J.

I am of opinion that the demurrer interposed by defendant to the evidence should have been sustained. The evidence, I think, wholly failed to show that the injury in question occurred in Egypt township.

It has been uniformly held, since the decision in *Hansberger v. Pacific Railroad* (43 Mo. 196), that the action under the double liability section of the statute, when begun in a justice's court, must be instituted before a justice of the township in which the injury occurred. It is a jurisdictional fact, and must appear affirmatively of record.

In the case of *Mitchell v. Railroad* (82 Mo. 106), it was expressly held that this fact was not only essential to be averred, but, as a necessary sequence, it should also

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be proved at the trial; and because of the absence in the record of such proof, the case was reversed and remanded. This ruling was followed subsequently, at the same term, in a case between the same parties.

In the record in the case here under consideration, there is not one word of evidence to show that this injury occurred in Egypt township, unless it can be maintained that the jury might infer the fact from the proof that it occurred in the town of Norborne. How the jury trying this case at Carrollton, the county seat, could draw the conclusion that Norborne is in Egypt township is not comprehensible within the rules of evidence. These township lines are made and unmade at the discretion of the county courts. The courts would not take judicial cognizance that Norborne was in Egypt township. How then could a jury infer it? There is no necessary connection between the fact proved and the fact inferred.

The court did not submit, even, the question to the jury whether or not Norborne was in Egypt township; for the second instruction given for plaintiff directed the jury, that if they found the injury was done in the town of Norborne that was sufficient, as to the *locus in quo*, to warrant the verdict for plaintiff.

I confess it is difficult to reconcile the opinion of Wagner, J., in *Nall v. Railroad*, 59 Mo. 112, with what is here said. If it was intended to hold that because the statement alleged that the injury occurred in the given township that was sufficient, without more, to maintain the verdict, it is in direct conflict with repeated decisions, in effect, of the supreme court, and especially with that of *Mitchell v. Railroad*, *supra*. He states that the place where the injury occurred was clearly proved, and that the evidence showed at what point it happened, and the question was for the triers of the fact. If so, it is curious that he should have justified the action of the trial court in refusing an instruction which submitted that identical question to the jury to be found.

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If he meant to say there was proof of a certain fact or facts from which the jury might reasonably have inferred the essential fact, it is more singular that he should make the inference for the jury in order to maintain their verdict. The fact should have been left to the jury to be found; but by refusing the second instruction the trial court, in effect, held that it was not necessary to find such fact to authorize a verdict for plaintiff. If this be a correct construction of the learned judge's opinion, it is in conflict, in my opinion, with the latter decisions of the supreme court, as well as sound principles of law, founded on the established rules of pleading, practice and evidence.

I, therefore, hold that the judgment of the circuit court should, on this account, be reversed and the cause remanded. In this opinion Ellison, J., concurs. Hall, J., being of opinion, as stated in his separate opinion, that the conclusion reached by the majority of the court is in conflict with the decision in *Nall v. Railroad, supra*, and that said decision has not been directly overruled, it is ordered, that this cause, together with the transcript and these opinions, be certified to the supreme court of this state, as provided in section six, of the constitutional amendment, creating the Kansas City court of appeals.

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CASES DETERMINED

IN THE

St. Louis and the Kansas City COURTS OF APPEALS.

OCTOBER TERM, 1886.

George A. Drumheler, Respondent, v. John S. Haff, Appellant.

St. Louis Court of Appeals, October 26, 1886.

1. Equity—Wills—Trusts and Powers.—Under a will which provides for the payment, many years thereafter, with accumulated interest, of a small legacy out of the proceeds of the real estate devised to the executors, residue to the executors and others, the executors take an estate with power to convey, for the above purposes.

2. ——— Bequests not a Charge upon the Lands, When.—In such a case, where the executors convey for a full consideration, they will be held to have executed this power, irrespective of whether the deed so recites, and the grantee takes the land discharged of the legacy.

3. ——— Application of Trust Fund.—The executors in such a case being trustees for certain purposes which require time, discretion, and deliberation, the purchaser is not bound to see that the purchase money is properly applied.

4. ——— Legatee's Remedy.—The legatee's remedy in such a case, where the legacy has not been paid, is against the executors and not against the land.

Appeal from the Pike County Circuit Court, Elijah Robinson, Judge.

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Reversed and judgment.

W. H. MORROW, for the appellant: The purchaser of the land took it discharged of the trust. 2 Story Eq. Jur., sect. 1127; *Clark v. Hosenthall*, 47 Miss. 434; *Elliott v. Merryman*, Barnard Ch. R. 78; *Foster v. Craig*, 2 Dev. & Bat. 209. The trust in this case is both for the payment of debts and the plaintiff's legacy, a mixed trust, and the purchaser of the realty is not bound to see to the application of the purchase money. *Shaw v. Borror*, 1 Keen R. 559, 574 to 576; 2 Story's Eq. Jur., sect. 1132, p. 473, *et seq.* The "certain sum" mentioned in the will was not to be paid to the plaintiff, it was "to be set apart" to be applied by the executors to a certain purpose, to accumulate interest, and required on their part time, deliberation, and discretion, in the exercise of their capacity as trustees of a special fund. 2 Story's Eq. Jur., sect. 1134, p. 475; *Wormley v. Wormley*, 8 Wheaton R. 442-3.

EDWARD T. SMITH, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

Jane Myers made her will containing the following provisions:

"1st. It is my wish that all my just and legal debts be paid by my executors. 2nd. It is my wish that at my decease a certain sum be set apart from the rest of my estate and to be given to George A. Drumheler, only son of Elizabeth A. Drumheler, at the age of twenty-one years; said sum, together with accumulated interest, shall not exceed four hundred dollars at his age of twenty-one years. 3rd. It is my wish that my real estate, after the above mentioned deduction, be equally divided between J. G., A. M., O. A., and Jas. O. Myers; my personal property divided between A. M., O. A., and Jas. O. Myers. 4th. It is my wish that my

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will and testament be recorded in the clerk's office, according to law, and my business be not taken to court or recorded, according to law, and I wish my executors to carry out the designs of my will without any of the qualifications of law. 5th. It is my wish that John G., Ovid A., and James O. Myers, be my executors."

The will bore date July 18, 1866, and the testatrix died during that month. The executors, who were the joint devisees of the real estate with A. M. Myers, never set apart any sum under the second clause of this will. They conveyed part of the land devised to them, September 9, 1867, with statutory covenants of warranty for its full market value, to one Gillum, under whom the defendant claims, and subsequently conveyed the residue of the lands to James O. Myers, one of the devisees.

It is conceded that the will was duly recorded, and that all the parties had timely constructive notice of its provisions. At what time the legatee, Drumheler, arrived at the age of twenty-one, does not distinctly appear, either by the pleadings or the evidence. It does appear that one hundred and twenty-five dollars of the legacy was paid to him by James O. Myers, one of the devisees and executors, and that the residue remains unpaid. It may fairly be inferred, however, as against the legatee, that he did not arrive at age prior to the year 1884, when he instituted this suit, to charge the lands conveyed to the defendant as above stated, with two hundred and seventy-five dollars, the residue of the legacy remaining unpaid, with interest, from March 1, 1884.

Upon this showing the trial court made a decree, subjecting the land in the defendant's hands with the payment of $310.42, part and parcel of the legacy thus bequeathed.

This decree could not be permitted to stand, because, aside of other objections, there is no evidence in the record to furnish a basis for the computation of interest on that portion of the legacy which remains unpaid, the

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exact time when the legatee arrived at the age of twenty-one nowhere appearing, but there are other and more serious objections to its validity, which go to the very foundation of the action.

The testatrix died in July, 1866, when the legatee, Drumheler, was three or four years of age. The sum to be raised by sale of the real estate, or part thereof, was not a definite sum, but one which, with accumulated interest for a period of seventeen or eighteen years, would amount to four hundred dollars. It follows from this that it was not the intention of the testatrix to charge the lands with the payment of any definite sum, as in the very nature of things the sum that would realize with accumulated interest, in seventeen years or more, a sum equal to the proposed bounty of the testatrix, could not be measured by any fixed standard. Even in cases where the trusts are defined, and the money is to be applied by the trustees to certain purposes which require on their part time, deliberation, and discretion, the purchaser is not bound to see to the due application of the purchase money. 2 Story's Eq. Jur. 1134; 2 Sugd. on Vend., 8 Am. Ed., m. p. 659; *Balfour v. Welland*, 16 Ves. 155, 156; Rev. Stat., sect. 3937. How then can it be held in this case, that the purchaser under whom the defendant claims, who bought the land within a year after the decease of the testatrix, and more than seventeen years prior to the date fixed for the payment of the legacy, was to see to it that the trustees not only invested a sufficient amount of the fund realized to yield, with accumulated interest, four hundred dollars in seventeen years, but also to see to it that they paid that sum, with accumulated interest, seventeen years thereafter, to the legatee.

Giving to the second clause of the will the only rational construction that it will admit of, and we find that the testatrix devised her real estate to her executors, with a power to dispose of the same for the pur-

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pose of raising a sum sufficient to constitute this legacy, and devising the residue to them and one other devisee.

When the executors disposed, by conveyance, of a sufficient part of this estate to provide for the legacy, they are held, in the absence of positive evidence furnished by the deed itself, to the contrary, to have acted in the exercise of this power, as the fact that no reference is made to the power in the deed itself is, under the rule established in *Campbell v. Johnson*, 65 Mo. 439, immaterial. Such power to convey is necessarily a power to convey an absolute title. Any contrary holding would lead to the untenable proposition, that the executors had power to convey land for the purpose of raising a certain sum of money, which sum, after the conveyance, remained a charge upon the land conveyed.

It results from the foregoing that the decree must be vacated. The complainant's remedy is against the trustees and not against the land. As no useful purpose can be subserved by remanding the cause, it will not be remanded. It is ordered that the judgment be reversed and judgment entered for the defendant in this court. All the judges concur.

23	165
78	562
23	165
82	300
23	165
85	623
23	165
177s	60

SCOTLAND COUNTY NATIONAL BANK, Respondent, v. DANIEL O'CONNEL ET AL., Appellants.

St. Louis Court of Appeals, October 26, 1886.

1. NEGOTIABLE INSTRUMENTS—ALTERATIONS.—Generally, the holder of negotiable paper which has been altered so as to increase the maker's liability thereon, can not recover against the maker.

2. ——— The makers of a negotiable note having delivered it to their co-maker in a condition which enables him to fill blank spaces without changing the appearance of the paper as a genuine instru-

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ment, are liable thereon to the purchaser in good faith, notwithstanding the alteration.

3. ACTIONS.—He who, by his carelessness, has enabled another to obtain the money of an innocent person, is answerable for the loss.

4. APPELLATE PRACTICE.—Where it clearly appears, from the obvious, admitted and found facts that the verdict is for the right party, the judgment will not be disturbed because of the giving of erroneous instructions.

APPEAL from the Scotland County Circuit Court, BEN. E. TURNER, Judge.

Affirmed.

SMOOT & PETTINGILL, for the appellants: The holder of perfected negotiable paper, which has been altered by raising the amount, can not recover. *Greenfield Bank v. Stowell*, 123 Mass. 203; *Knoxville Bank v. Clark*, 51 Iowa, 264; *Haskell v. Champion*, 30 Mo. 136; *Robinson v. Berryman*, 22 Mo. App. 509.

McKEE & JAYNE, for the respondent: He who enables another to commit a wrong, is liable for the consequences. *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Shirts v. Overjohn*, 60 Mo. 305; *Trigg v. Taylor*, 27 Mo. 245; *Ivory v. Campbell*, 33 Mo. 98.

ROMBAUER, J., delivered the opinion of the court.

The plaintiff brought its action upon a promissory note, charged to have been executed by the defendants, jointly with one T. S. Smith. The defendants answered under oath, denying the execution of the note.

The evidence tended to prove the following facts: That T. S. Smith made a negotiable promissory note to the order of the Scotland County National Bank for one hundred dollars, and obtained the signatures of the defendants thereto as joint makers, and that thereafter and prior to the delivery of the note to the bank, he altered the note by adding after the words "*one hundred*," the

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words "*thirty-five.*" Also, that the entire written part of the note is in the handwriting of Smith, who had left sufficient blank space after the words one hundred to insert the words thirty-five; that these last words were inserted in the same handwriting, with the same ink, and in a manner to avoid detection of the alteration; that there was nothing in his transaction with the bank to arouse suspicion of its agents, and that the bank purchased the note in good faith before maturity, for a full and valuable consideration.

These being the substantial facts, the court, upon the plaintiff's request, charged the jury as follows:

"Although the jury may believe, from the evidence, that the note was altered by adding the words thirty-five, after the defendants' signatures were attached to it (if the jury believe, from the evidence, that the defendants signed it), then in such case the jury will find for the plaintiff; if they shall believe, from the evidence, that J. W. Barnes, cashier of plaintiff, bought and received said note, and that at the time said note was so bought and received, there was no marks upon the face of said note such as would arouse suspicion upon the part of a careful man upon inspection thereof, and that said cashier bought and received same in good faith and believing it to be genuine."

Under this instruction the jury returned a verdict for the plaintiff for the full amount of the note and interest.

We have no hesitation to say that this instruction is erroneous. As applicable to the facts of the case, it omits several important qualifications. If the law were as therein stated, parties to commercial paper would be at the mercy of any skillful forger, and might have their liability increased a thousand fold, without any negligence on their own part, provided the alteration of the sum to be paid was executed with sufficient skill to mislead careful men. We conceive that the general rule on this point in this state is now, as it always was, that the

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holder of even a negotiable note or bill, which has been altered by raising its amount, without the consent of the party to be charged, can not recover against such party, whatever the good faith of such holder may have been in acquiring the paper.

But we do not consider this error, under the peculiar facts of this case, to have worked such prejudice to the defendants as to demand a reversal of the judgment. The original of the note sued on is preserved in the record before us, and its inspection conclusively corroborates the testimony offered by the plaintiff, and establishes beyond controversy that the defendants executed and delivered a note to Smith, the body of which was in Smith's handwriting, in a condition which enabled him to add the words thirty-five to the written part of the sum and the figures $135.00 at the head of the note in the space usually reserved for that purpose, before delivering the note, and to do so in a manner to baffle detection. That the signatures are those of the defendants, and that the bank took the paper in good faith and for value, are facts found by the jury.

The obvious, admitted, and found facts present a case, where negotiable paper is delivered by part of the makers to their co-maker, for whose benefit it is executed, in such a condition as to enable him to fill blank spaces, without in any manner changing the appearance of the note as a genuine instrument. This, under the rule announced in *Iron Mountain Bank v. Murdock* (62 Mo. 70), will warrant a recovery on the part of the holder in good faith for value, notwithstanding the alteration. To a case of this kind the doctrine is fairly applicable that "he who by his carelessness or undue confidence has enabled another to obtain the money of an innocent person shall answer the loss." *Chapman v. Rose*, 56 N. Y. 137.

Of course, no general rule can be laid down which will be applicable to cases of this character without exception. But, taking the peculiar facts of this case into

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consideration, it appears to be one wherein the judgment should be affirmed on the ground that it is for the right party, notwithstanding apparent errors in the trial of the cause. All the judges concurring, it will be so affirmed.

JAMES DAWSON, Appellant, v. EVA V. DAWSON, Respondent.

23	169
34	124
23	169
37	208
37	473
23	169
51	634
23	169
56	93

St. Louis Court of Appeals, October 26, 1886.

1. STATUTES—RE-ENACTMENT—CONSTRUCTION OF.—Words used in a statute will be construed with reference to their generally accepted meaning at the time of the passage of the act, there being no presumption that the legislature in re-enacting the statute intended that the words should have an enlarged meaning.

2. DIVORCE—HABITUAL DRUNKENNESS—OPIATES.—The statute which makes habitual drunkenness for the period of one year a ground for divorce, includes only alcoholic intoxication.

3. ——— The habitual use of opiates, whose tendency is to render the user callous, reckless, untruthful, and stupid, to cause physical prostration, to undermine and destroy all the objects of the marital relation, and which habit is usually incurable, constitutes such indignities as furnish ground for a divorce.

APPEAL from the St. Louis County Circuit Court, ELIJAH ROBINSON, Special Judge.

Reversed and decree for the plaintiff.

ALEX. MARTIN, for the appellant: Habitual drunkenness produced by opium is within the spirit of the statute. *Barber v. Barber*, 14 Laws Rep. 375. Habitual drunkenness produced by opiates is an indignity for which a divorce may be granted. *Kimpf v. Kimpf*, 34 Mo. 211.

ZACH J. MITCHELL, for the respondent: Intoxica-

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tion produced by the use of opiates does not constitute drunkenness within the meaning of the statute. Comp. Laws Conn. 378–9.

ROMBAUER, J., delivered the opinion of the court.

This is an action for divorce. Two of the statutory grounds are assigned by the plaintiff: 1. That the defendant has been addicted to habitual drunkenness for the period of one year, next preceding the institution of this suit. 2. That she has offered to the plaintiff such indignities as to render his condition intolerable.

The defendant denied the allegations of the petition and filed a cross-bill on the ground of indignities offered to her. The cause was tried by a special judge selected by the parties, who, upon the hearing of the cause, dismissed both bill and cross-bill, and the plaintiff alone appeals.

For the purpose of considering the two propositions of law which are raised by the record, a preliminary statement of such facts as bear upon them is essential.

The plaintiff is a well-to-do farmer, advanced in years, and was at the date of his marriage a widower, having a family of grown children. The defendant, much younger than the plaintiff, was a childless widow, and a resident of Memphis, Tennessee. The plaintiff made her acquaintance in the summer of 1882, during a short visit to Memphis, and married her in December, 1882, his previous acquaintance with her being very slight. He at once brought her to his farm in St. Louis county, where they continued to live together until November, 1884. At this last date, the defendant, with her infant daughter Bessie, issue of her present marriage, left in company of her sister, a resident of Memphis, for that place on an extended visit. This departure was with the plaintiff's consent.

The present suit was instituted by the plaintiff February 25, 1885, and prior to the defendant's return, and

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a copy of the petition was served upon her in the city of Memphis.

The evidence introduced upon the hearing established beyond a reasonable doubt, that the defendant, either was already at the date of the marriage a confirmed consumer of opium in its various forms of laudanum and morphine, or that she became such shortly thereafter, and that she continued in the habit during the entire period of co-habitation.

On that subject, the judge who tried the cause, in an opinion embodied in the record, and referred to by both parties, states:

"I am convinced by the great preponderance of the testimony in the cause, that she (the defendant) engaged the servants and employes about the place to procure laudanum and morphine for her; that she procured the same herself on different occasions; that when endeavoring to procure these drugs she assumed a name other than her own for the purpose of concealing her identity; that she visited a neighboring store at an unseemly hour of the night for the puprose of procuring them, and that she endeavored to keep from her husband the knowledge of all these facts."

This statement is fully borne out by the record, and the learned judge might have added with equal propriety, that she disposed of small proceeds of the farm in exchange for the baneful drug. That when unable to obtain by these means sufficient to satisfy her appetite, she finally put her jewelry in pawn with a storekeeper for the same purpose. Also that the continued use of the drug, exerted its usual effect on her constitution and habits, undermining the former, and rendering her, to a great extent, callous to her surroundings.

As to the ordinary effect of the drug, on those addicted to its continual consumption, a medical expert testifies:

"The absorption of the drug is a dislocation of all functions, it causes the patient to dream the most beau-

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tiful dreams, and see the most lovely visions, which are followed by a stage of corresponding depression, which causes the patient to fall as much below, as he has been above the natural plane."

And again:

"An overdose of alcohol presents almost the same phenomena witnessed in an overdose of morphine, laudanum, or opium, that is, alcoholic coma is induced, in which the symptoms are almost precisely the same."

As to the effects upon the moral character of the patient, the same expert states:

"It destroys the moral tone. An opium eater is necessarily a liar. No chronic opium eater tells the truth. They will disregard the ordinary requirements of life. They are willing to present themselves in society in a very unenviable light, thinking nothing of it. They disregard the requirements of the household, their relations to their children and family—all these they set at naught."

An examination of medical authorities on the subject fully confirms this expert testimony. In fact, it must be conceded that the habit of intoxication by opiates, when once thoroughly contracted, becomes incontrollable, and that its results, while in the main the same, are far more baneful than those of alcoholic intoxication.

Another expert, and a physician of very extended experience, testifies that of a great number of cases that came under his observation, there was only one in which a habitual consumer of opium succeeded in ridding himself of the habit.

Such being the testimony in the case, the plaintiff contends that he is entitled to a divorce on the first ground stated in his petition, and that the trial court erred in holding that intoxication by opiates was not drunkenness within the purview of the statute.

After some hesitation, we have come to the conclusion that the view taken by the trial court on this

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subject is the correct one. The question is not whether intoxication by opiates is not fully as baneful in its results as alcoholic intoxication, but in what sense the legislature has used the word drunkenness. The act concerning divorce and alimony, approved January 24, 1835, made it a ground of divorce when either party was addicted to habitual drunkenness for the space of two years. The law has remained the same ever since, except that the time has been changed from two years to one.

It is a historic fact that in 1835, and for many years thereafter, intoxication by opiates was comparatively rare, while alcoholic intoxication was common and generally known by the term of drunkenness. The meaning of the word drunkenness, "in its plain, ordinary and usual sense," could not at that time have been anything but alcoholic drunkenness. Nor can it be said that the legislature in re-enacting the statute in almost the identical words ever since, intended to change the meaning of the word drunkenness from its meaning as originally fixed. What little authority can be found on this subject, in the decisions of other tribunals and in the opinion of text writers, seems to conform to the view as above expressed. *Barber v. Barber*, 14 Law Rep. 375; 1 Bishop on M. & D. sec. 318.

The plaintiff, however, is entitled to a divorce on the second ground alleged. It is established by a great preponderance of the testimony that the habitual consumption of opiates had its usual effect upon the defendant. Her fits of excessive hilarity followed by drowsiness, stupor, and occasional complete prostration are well attested. Her denial of the habit to her husband, when charged with it, and her contradiction of a number of unimpeached witnesses, tend to show that the indulgence of the habit has made her untruthful and undermined her moral nature in that respect. One of her own witnesses, a minister of the gospel, expressed himself, after a visit to her house, that he thought the lady was

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crazy; that she was a fit subject for a lunatic asylum, and would be there in a few days, and says that such was the impression she made on him at that time.

That the habit had become with her wholly uncontrollable seems evident from the fact, that within a period of less than two years, according to the testimony, she bought and caused to be bought for her use, nearly two hundred bottles of opiates in its various forms. That she endeavored to hide these purchases from her husband; that she made reckless efforts to obtain the drug, at times leaving the house during the small hours of the night.

The use of opiates for the purpose of intoxication by the defendant, was suspected if not known by her husband, prior to her departure for Memphis in December, 1884; but there is little doubt but that he was neither aware of the extent to which she had used the drug, nor of the humiliating steps to which she had frequently resorted for the purpose of obtaining it, until after her departure.

Under these circumstances we find that the constant indulgence of this habit by the defendant, and its results as shown by the testimony, were indignities of a character to render her husband's condition intolerable.

That the habitual and excessive use of opiates may destroy all objects of the marriage relation admits of no doubt, yet we can not supply by judicial construction a seeming legislative omission. Courts can not make the habitual use of opiates for the purpose of intoxication, a cause of divorce on the ground of drunkenness, but where the effects of such use are such as to render the condition of the other party intolerable, they should treat the effect as indignities offered. They should construe the clause of the statute concerning indignities liberally, so as to afford a remedy for a mischief, which is clearly within the spirit although not within the letter of any of the other clauses. *Kempf v. Kempf*, 34 Mo. 214; *Cannon v. Cannon*, 17 Mo. App. 393.

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The testimony in this case fails to show in direct terms to what extent the plaintiff's condition did become intolerable, but we are justified to assume that the condition of any husband, if not utterly devoid of sensitiveness, would become intolerable within the meaning of the statute, by conduct on the part of his wife, which is designed to destroy all companionship between them, and tends to separate him socially from his neighbors, regardless even of the constant mortification to which he is subjected by the conduct of his wife in their daily intercourse.

It results from the views thus expressed that the decree dismissing the plaintiff's bill must be reversed. We will not enter a decree for the plaintiff here, because we are not in a position, from the facts before us, to adjudge all incidental matters touching the custody of the child, or touching alimony during the pendency of the suit, in the payment of which, as we are advised by motion, the plaintiff is in arrears, but will remand the cause for further proceedings.

It is ordered that the decree dismissing the plaintiff's bill be reversed; that the cause be remanded to the trial court with directions to enter a decree for the plaintiff dissolving the bonds of matrimony between him and the defendant, the plaintiff first paying to the defendant or into court for her use, all arrearages, if any, in the alimony heretofore awarded to her by the trial court. It is further ordered that the trial court make such orders touching the care, control, and custody of the infant child of the parties, and alimony, if any, for its sustenance, as the interests of said infant may demand. Judge Lewis concurs. Judge Thompson dissents.

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23	176
37	486
30	177
23	176
56	415
23	176
143m	246

STATE OF MISSOURI, Respondent, v. JOSEPH T. FARRELL, Appellant.

St. Louis Court of Appeals, October 26, 1886.

1. JURISDICTION—CONSTITUTIONAL QUESTION—APPELLATE PROCEDURE. —An order of the supreme court, transferring to the court of appeals a cause theretofore sent to it on appeal from the trial court, on the ground that it involved a constitutional question, is equivalent to an adjudication that it involves no such question.

2. GAME LAWS CONSTRUED.—The statute prohibiting the killing or having in possession of certain game within a given period of time, is violated by having such game in possession within the prohibited time, irrespective of the time and place of their killing.

APPEAL from the St. Louis Court of Criminal Correction, E. A. NOONAN, Judge.

Affirmed.

ROMBAUER, J., delivered the opinion of the court.

Upon information filed, the defendant was convicted of having unlawfully in his possession, and of unlawfully selling in this city pinnated grouse, within the season when the catching and killing of said birds is prohibited by law. He was fined for each offence. The cause was tried upon an agreed statement of facts, whereby the defendant admitted the possession and sale of the birds as charged, and the state admitted that the birds were killed partly outside of this state, and partly in this state, at a season when the killing was not prohibited.

The defendant, thereupon, took an appeal to the supreme court on the ground that the case involved a construction of the constitution of the United States, and that the supreme court had appellate jurisdiction thereof. The supreme court, upon inspection of the

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record, ordered the case to be transferred to this court, but filed no opinion in so doing.

The action of the supreme court in ordering a transfer of the record to this court, is necessarily a denial of the defendant's claim that the case involves a constitutional point. But, even were we justified to hold that the order of transfer was made with a view of having us decide all the points arising in the case, we would still have to affirm the judgment of the trial court, as we have repeatedly decided heretofore that the offence charged consists in having the game in possession or selling it, regardless of the fact where and when it was killed, and that the law does not violate any provision of the constitution of the United States or of this state. *The State v. Judy*, 7 Mo. App. 524; *The State v. Randolph*, 1 Mo. App. 17.

The judgment is affirmed. All the judges concur.

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STATE OF MISSOURI, Defendant in Error, v. EDWARD KAUB, Plaintiff in Error.

St. Louis Court of Appeals, October 26, 1886.

APPELLATE PRACTICE.—A cause having been taken by writ of error from the trial court to the supreme court on the ground that it involved a constitutional point, and thence transferred to the court of appeals, the latter court will treat such transfer by the supreme court ar equivalent to a decision by said court that the case did not involve a constitutional question.

ERROR to the St. Louis Court of Criminal Correction, E. A. NOONAN, Judge.

Writ dismissed.

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ROMBAUER, J., delivered the opinion of the court.

This cause was heretofore before us on appeal and our opinion therein is reported in 19 Mo. App. 149. We affirmed the judgment of the trial court, whereupon the defendant sued out a writ of error in the supreme court directed to the trial court, on the ground that the case involved a construction of the constitution of the United States, within the meaning of section 12, article 6, of the constitution of Missouri. The supreme court upon examination of the record remanded the cause to us, thereby adjudging, as we had done theretofore, that the cause involved no constitutional point, and that we had exclusive appellate jurisdiction thereof. As we had passed on the merits of the case before, and affirmed the judgment of the lower court, it results that the only disposition we can make of this writ is to dismiss it. All the judges concurring the writ of error is dismissed.

FREDERICK LONG, Respondent, v. ST. LOUIS, KEOKUK & NORTHWESTERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, October 26, 1886.

1. RAILROADS—NEGLIGENCE—PRACTICE.—In an action against a railroad company for damages for killing cattle at a point not on, or in the immediate vicinity of, a public road crossing. but at a point where the railroad company is not required to fence its right of way, the plaintiff must show that the defendant's negligence was the cause of the accident.

2. ——— FAILURE OF PROOF.—In such a case, evidence of a failure to ring the bell or blow the whistle in approaching a public road crossing at a considerable distance from the place of the accident is not such proof of negligence as will warrant a verdict for the plaintiff.

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APPEAL from the Louisiana Court of Common Pleas, ELIJAH ROBINSON, Judge.

Reversed and judgment.

W. H. MORROW, H. H. TRIMBLE, and PALMER TRIMBLE, for the appellant.

W. H. BIGGS and M. G. REYNOLDS, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff complained before a justice of the peace, that his cattle were run over and killed by the defendant's train of cars, "on account of the negligence and careless management of said train of cars on the part of defendant's agents and servants." On the defendant's appeal to the Louisiana court of common pleas, the testimony tended to show that the cattle were killed within and near the south end of the depot grounds at Ashburn station, where they were lying on the track, and in the night time. The train was running south. There was a public road crossing about two hundred and fifty yards north of the depot, and a private cross way in general use, at the north end of the depot, and one hundred or more yards north of the place where the cattle were killed. There was conflicting testimony about the ringing of the bell and the sounding of the whistle. The court, of its own motion, gave the following instruction:

"Before the plaintiff can recover in this case it devolves on him to prove to the satisfaction of the jury, by the evidence in the case, that the stock in question were struck by defendant's engine at or near a traveled road crossing; that the defendant's employes in charge of said engine did not, when approaching said crossing, ring the bell or sound the whistle, and that the failure so to do caused the injury complained of. If these facts

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have been proven to the satisfaction of the jury, the verdict will be for the plaintiff, otherwise it will be for the defendant."

This instruction was erroneous. It was intended to measure the defendant's liability by the provisions of Revised Statutes, section 806, which requires that a bell shall be rung or a whistle sounded "at least eighty rods from the place where the railroad shall cross any traveled public road or street," and such ringing or whistling is to be continued until the engine shall have crossed such road or street. Our supreme court, in *Bell v. Railroad* (72 Mo. 50), declares that this statute "was for the benefit of persons at the road crossing or approaching it;" and that it had no application to the case of a boy who was killed while standing on the track, forty or sixty feet in advance of the engine when at the place where it reached the crossing. The cattle, in the present case, were at a much greater distance even from the private crossing, which was the nearest one to them; and it is not altogether clear from the evidence that that was a "traveled public road or street" within the meaning of the statute. It may be a question whether the statute contemplates anything more than a warning to human intelligence, without any reference to the instinct of brutes which may neither regard nor comprehend a distant signal. But that question is immaterial here. There is in the record no evidence tending to show that there was any negligence or mismanagement in the running of the train. *Potter v. Railroad*, 18 Mo. App. 694. The defendant's instruction demurring to the evidence ought to have been given.

The judgment is reversed, and judgment for the defendant will be entered here. Judge Rombauer concurs. Judge Thompson concurs in the reversal, but is of opinion that the record does not show such a total absence of negligence as to warrant a judgment for the defendant in this court.

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PINCKNEY E. BROWN, Respondent, v. BARNABAS McCORMICK ET AL., Appellants. 23a 181 / 32a 75

St. Louis Court of Appeals, October 26, 1886.

1. **UNLAWFUL DETAINER—POSSESSION—ABANDONMENT.—In an action of unlawful detainer in which the only question is whether the defendant's conceded prior possession had been abandoned before the plaintiff's entry upon the land, the question of abandonment is one of fact.**

2. **—— INSTRUCTIONS.—In such a case, where there is substantial evidence of the lawfulness of the defendant's possession at the time when the suit was brought, the facts being controverted, an instruction founded on the plaintiff's testimony, and ignoring countervailing facts proved by the defendant, is erroneous.**

APPEAL from the Clarke County Circuit Court, BEN. E. TURNER, Judge.

Reversed and remanded.

N. F. GIVENS and REED & WHITESIDE, for the appellants: The lease in question did not give the plaintiff possession. *Michan v. Walsh*, 6 Mo. 346. The plaintiff must have *bona fide* peaceable possession of the premises, and not a mere sham. *DeGraw v. Prior*, 60 Mo. 56; *Edwards v. Cary*, 60 Mo. 572. The title and right of possession is not sufficient. *Beeler v. Cardwell*, 29 Mo. 72. Possession merely to gain some advantage at law is not *bona fide*. *Keene v. Schnedler*, 9 Mo. App. 597; *Dyer v. Reitz*, 14 Mo. App. 45. A party who asks an instruction on the whole case must so frame it as not to exclude from the jury the points raised by the evidence of the other party. *Clark v. Hammerlé*, 27 Mo. 55; *Sawyer v. Railroad*, 37 Mo. 240; *Fitzgerald v. Hayward*, 50 Mo. 516.

W. L. BERKHEIMER, for the respondent: The exe-

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cution of a lease and the taking possession of the premises thereunder, and exercising the usual acts of possession, are evidences of lawful possession. *McCartney v. Alderson*, 45 Mo. 35; *Bartlett v. Draper*, 23 Mo. 407; *Miller v. Northup*, 49 Mo. 397; *Miller v. Tillman*, 61 Mo. 316. The McCormicks are precluded and estopped now, to either claim the land, or that they were in possession. *Bunce v. Beck*, 46 Mo. 327; *Chatterton v. Gordon*, 39 Mo. 229; *Pelkington v. Insurance Co.*, 55 Mo. 172; *Taylor v. Saugrain*, 1 Mo. App. 312.

LEWIS, P. J., delivered the opinion of the court.

This is an action of unlawful detainer. The complaint states that the plaintiff, on the first day of March, 1886, "had the legal right to the possession" of the premises described, and that the defendants, "on the day and year aforesaid, wrongfully and without force, by disseisin, obtained, and continues in possession of said premises after demand made in writing for the delivery of the possession thereof."

It appears, from the testimony, that the land was owned by one Lapsley, who leased it to the defendant, Barnabas McCormick, for the year 1885, and until March 1, 1886. During the summer of 1885, there was some talk between these parties about a renewal of the renting for the year 1886. Lapsley testifies that no definite conclusion was reached. McCormick testifies that the parties came to a distinct understanding that he was to have the land for the ensuing year, if he should not, in the meantime, sell out and remove to Nebraska; that he did not so remove, and, considering himself still the tenant of Lapsley, never at any time surrendered or abandoned his possession as such. He did some ploughing on the place in the fall of 1885, in preparation for the next year's crop, having an understanding with Lapsley that, in the event of his removal to Nebraska, Lapsley would pay him for the work. It should be here remarked that

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the controversy is confined to the east half of the forty-two acre tract described in the complaint.

The plaintiff testified that he rented the west half of the tract from Lapsley in August, 1885, and the east half from the same party on March 6, 1886. That he "took possession of the land on the first day of March, 1886, by going in on the land, fixing the fence up, getting ready for corn, and I and my hand cut twenty acres of stocks on the east part of the land." It further appeared in the testimony that in November, 1885, Lapsley caused a notice in writing to be served on McCormick for a surrender of the premises on the first day of March, 1886. Several witnesses testified that in the fall or winter of 1885, the plaintiff told them that, for the ensuing year, he was to have the west half of the tract and McCormick the east half. The plaintiff introduced testimony tending to prove that on the eighth or ninth of April, 1886, the defendants were plowing and doing other acts of possession on the land.

It sufficiently appears, from this statement, of only a part of the evidence, that a distinct issue was raised, as to whether the defendants, at the time when the plaintiff, as he says, "took possession" of the premises in dispute, were or were not still holding them—whether rightfully or wrongfully is immaterial—under their claim of a renewed renting for the year 1886, or whether they were or were not, in fact, holding the premises over under the previous renting. If the defendants were so holding the land, their possession was peaceable as against all the world, and it was impossible for the plaintiff to acquire a lawful possession against them, by merely going upon the land and exercising acts of ownership. He was a trespasser on the possession of another, and could acquire no right to perpetuate his trespass by legal procedure. There was substantial testimony on both sides, sufficient to entitle either party to a hearing on this issue by the triers of fact. The court gave the following instruction for the plaintiff:

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"If the jury shall believe, from the evidence, that plaintiff rented the land in dispute of D. H. Lapsley, and that thereafter he went upon the premises and put up fencing where it was out of order, and cut fifteen or twenty acres of stalks for the purpose of preparing the ground for cultivation, and that defendant, Thomas McCormick, came upon the land and plaintiff ordered him off the land, and then asserted his right to the land as tenant of Lapsley, then in such case the plaintiff was in the peaceable possession of the land. And if the evidence further shows that the defendants afterwards went upon the premises and commenced plowing the ground, and that plaintiff demanded possession thereof of defendants, and that the defendants refused to deliver the possession to the plaintiff, then in such case the defendants' possession of the premises is unlawful, and it would be immaterial in this action whether Lapsley agreed to let McCormick have the land in dispute for the year 1886, and in such case the verdict should be for the plaintiff."

This instruction took the defendants' whole case away from the jury. It told them, in effect, that their verdict must be founded upon the plaintiff's testimony, without paying any regard to that submitted by the defendants. A verdict so shaped can not be permitted to stand.

The judgment is reversed, and the cause remanded, with the concurrence of all the judges.

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THE STATE EX REL. BELL TELEPHONE COMPANY, Respondent, v. HENRY FLAD ET AL., Appellants. 23a 185 / 31a 30 / 23 185 / 42 351

St. Louis Court of Appeals, October 26, 1886. 23 185 / 145m 594 / 23 185 / d88 318

1. TELEPHONE COMPANIES—RIGHTS AND LIABILITIES.—Telephone companies organized under the laws of this state may set their poles along the public streets of cities, subject to regulation by ordinance as to the location and kind of posts, piers, and abutments, and the height of the wires.

2 ——— MANDAMUS—ST. LOUIS—LIMITATION OF POWERS.—The board of public improvements of the city of St. Louis can not impose conditions other than those imposed by statute and ordinance upon telephone companies, and where such companies have complied with all the lawful requirements, the board will be compelled by mandamus to issue a permit for the erection of poles on the streets.

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

LEVERETT BELL, for the appellants.

HITCHCOCK, MADILL & FINKELNBURG, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is a proceeding by mandamus to compel the board of public improvements of the city of St. Louis to grant a permit, or permits, for erecting telephone poles upon certain streets and alleys in the city of St. Louis, in accordance with the provisions of an ordinance of the city numbered 11,604, by which the subject is regulated. A demurrer to the return was sustained by the circuit court, and, the defendants declining to plead further, a peremptory writ was ordered to issue.

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The question for decision, therefore, arises upon the legal sufficiency of the return, and it is this: Whether the board of public improvements have the power to oblige a corporation, formed under the laws of this state (under article 5, chapter 21, of the Revised Statutes, relating to the incorporation of telegraph and telephone companies), which may desire to erect telephone poles and establish telephone wires in the city of St. Louis, to enter into a stipulation (1) "to grant to any other company requiring electric wires for its business, the right to use one or more cross-bars of its poles at an annual rent of forty cents for half a cross-bar, and sixty cents for a full cross-bar, except in cases where the party asking for room on another company's poles is itself charging that company a higher rent per cross-bar on its own poles heretofore erected, in which case an equal rental may be demanded for wires on poles erected under these rules." And also (2) "that it will not place any more wires or cables on its own poles, or on the poles of other companies, than are actually necessary for its business, and that it will promptly remove any unused wires from the poles." The refusal of the relator to file its acceptance in writing of these conditions is, the return shows, the sole reason why the board refuses to grant the permit or permits prayed for.

The question is one of extreme simplicity. By section 879 of the Revised Statutes, it is provided as follows: "Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires, and other fixtures, along and across any of the public roads, streets, and waters of this state, in such manner as not to incommode the public in the use of such roads, streets, and waters." The only limitation imposed by the legislature upon this privilege relating to the use of the streets and alleys of cities and towns for telephone posts is embodied in section 888 of the Revised Statutes,

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which is in the following language: "The mayor and aldermen, or board of common council of any city, and the trustees of any incorporated town, through which the lines of any telephone or telegraph company are to pass, may, by ordinance, or otherwise, specify where the posts, piers, or abutments, shall be located, the kind of posts that shall be used, the height at which the wires shall be run; and such company shall be governed by the regulations thus prescribed; and after the erection of said telephone or telegraph lines, the said mayor and aldermen, or board of common council, and the trustees of any incorporated town, shall have power to direct any alteration in the location or direction of said posts, piers, or abutments, and also in the height at which the wires shall run, having first given such company or its agents opportunity to be heard in regard to such alteration." It will be seen that this limitation relates exclusively to three subjects: 1. The *place where* the posts, piers, or abutments shall be located. 2. The *kind* of posts that shall be used. 3. The *height* at which the wires shall be run.

Whether any power exists in the city of St. Louis under the provisions of its peculiar charter, which emanates from the constitution, and not from the legislature, to impose any additional restrictions, we shall not inquire, because the question does not arise upon this record. The pleadings disclose that the city has not attempted to exercise any such power, to which objection is made by the relators, although the board of public improvements has.

The board of public improvements is, as the return shows, a ministerial board of the city of St. Louis, whose duties, by the terms of the charter, are to be specified by ordinance. It also shows that the board has been empowered by ordinance to make such laws and regulations for its business and government, not inconsistent with the ordinances of the city, as it shall deem expedient. But this is merely the grant of a power

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to make by-laws and rules for the transaction of its own business as a board, and manifestly confers upon it no power to establish such regulations in respect of telephone companies as the ones in question.

The power, if it exists, must then be sought in other ordinances, and none has been pleaded which undertakes to confer it. Ordinance number 11,604, which is set out in the return, nowhere undertakes to confer the power to impose such regulations. Its provisions have been accepted by the relators, and no objection is made to them. Ordinances 11,976 and 12,723, by their terms, regulate the placing of wires, tubes, or cables conveying electricity for the production of *light* or *power* along the streets, alleys, and public places of the city of St. Louis, and manifestly were not intended to have any application to the subject of telephone poles or wires. The provisions of ordinance number 12,724, relating to telephone companies, have been accepted by the relator, and contain nothing which is pertinent to the question. Ordinance 12,733 relates merely to the license tax required to be paid by telephone companies, and, although set out in the return, is likewise irrelevant.

These are all the sources of power set up in the return, and, as they manifestly do not confer upon the board of public improvements the power to establish the regulations complained of, it must be concluded that no such power exists. As no power exists on the part of the board to impose these restrictions, the inquiry whether they are reasonable or unreasonable is totally irrelevant.

Nor is the argument that the relator, in accepting these regulations, entered into a binding contract with the city to abide by them, which it had not the power subsequently to withdraw, at all tenable. As the board of public improvements, in imposing these regulations, were not acting in pursuance of any power vested in them by charter or ordinance, they were not acting as agents of the city. An acceptance of these conditions

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by the relator, if otherwise sufficient to create a contract, would not, therefore, create a contract between it and the city. Moreover, the city is not, as the supreme court necessarily held when it remanded the cause to us for decision, after we had transferred it thence, a party to this proceeding, and is not claiming any rights against the relator, by contract or otherwise.

It is not worth while to argue the question that an agreement by the relators to abide by conditions which the board of public improvements had no power to annex to the privilege granted to the relator by the legislature, would not conclude it from a subsequent withdrawal of their agreement, especially where the city in the meantime, had done no act, or in any way changed position on the faith of such agreement so as to be prejudiced with its withdrawal.

The case then, nakedly, stands thus: The legislature has granted to this relator the privilege of erecting its posts and wires in the streets of the city of St. Louis, subject to the power of the city to impose the three conditions above named. The city has not, by ordinance, attempted to impose any other conditions which are objected to, nor has it empowered the board of public improvements to do so. Nevertheless the board—its members, no doubt, acting conscientiously, and with the faithful purpose of promoting the public interests—have attempted, of their own motion, to impose the two additional restrictions above set out, and to require the relator to accept the same before granting to it a permit or permits, to erect its poles and wires upon the streets and alleys named. This they could not do. And as they have made the refusal of the relator to accept these conditions the sole ground of their refusal to grant the permit or permits prayed for, it is a case where the legal right of the relator is clear; and, therefore, the judgment of the circuit court sustaining the demurrer to the return, and awarding a peremptory writ of mandamus, must be affirmed. All the judges concur.

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JOHN WHEELER, Defendant in Error, *v.* METROPOLITAN MANUFACTURING COMPANY, Plaintiff in Error.

St. Louis Court of Appeals, October 26, 1886.

1. APPELLATE PROCEDURE—ASSIGNMENT OF ERRORS.—In the absence of a formal assignment of errors, and where the appellant's brief assigns but one error, the appellate court will determine only the question raised by such assignment of error.

2. ——— Instructions will not be reviewed on appeal where the record does not show that exceptions were saved to the giving thereof.

ERROR to the St. Louis Circuit Court, DANIEL DILLON, JUDGE.

Affirmed.

HOUGH, OVERALL & JUDSON, for the plaintiff in error.

HENRY W. BOND, for the defendant in error.

THOMPSON, J., delivered the opinion of the court.

This was an action against the defendant, a corporation having its residence in the state of New York, for the malicious prosecution in the St. Louis court of criminal correction of a criminal action against the plaintiff. The answer was a general denial. The plaintiff had a verdict and judgment for five hundred dollars, and the defendant prosecutes a writ of error in this court.

There is no assignment of errors other than that contained in the statement and brief filed by the plaintiff in error, and the only error there assigned is, that the circuit court held that the defendant is liable for damages if one held out as an agent is guilty of malicious prosecution, although such prosecution was not

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authorized by the officers of the company. The record has been examined with care. The court did not submit the case to the jury upon this theory, but upon the three propositions, that in order to make the defendant liable, the agent by whom the suit was instituted (1) must have been either its general agent or manager, or (2) must have had general or special authority to bring it, or (3) that the defendant must have subsequently ratified it. An analysis of the instructions will, we think, show that these were the only theories on which the case was submitted to the jury. But if they were susceptible of the interpretation indicated by the assignment of error, the objection would still not be available because the record does not show that an exception was saved to the giving of them.

If the court, in the course of the trial, admitted evidence tending to show that the person or persons by whom the criminal prosecution was instituted and promoted had been held out by the defendant as its agent, or agents, we do not see any error in this, because this is one of the recognized modes of proving agency.

Under the rules of appellate procedure we are not called upon to make any further observations upon the record, and, being of opinion that the ground on which we are asked to reverse the judgment is not tenable, we order that it be affirmed. All the judges concur.

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Courtland Vandike, Appellant, v. John T. Maddix, Respondent.

St. Louis Court of Appeals, October 26, 1886.

Actions—Premature.—A subscriber to a fund for the erection of a mill became such under an agreement that if a necessity for the removal of the mill should arise, he should have a lien on the mill for the amount of his subscription. The mill was sold by the owner with the understanding that it would be removed, whereupon, the subscriber brought suit to recover his subscription. Held that the action was premature.

Appeal from the Scotland County Circuit Court, Ben E. Turner, Judge.

Affirmed.

R. D. Cramer, E. R. McKee, and J. M. Jayne, for the appellant.

Mudd & Wagner and Smoot & Pettingill, for the respondent.

Thompson, J., delivered the opinion of the court.

The defendant agreed to erect and maintain a saw and grist mill in the town of Arbela, in consideration of a number of citizens subscribing and paying to him the sum of one hundred and fifty dollars, the mill to remain a permanent improvement at said town, and, in the event of a necessity arising to require its removal, the various sums subscribed to be a lien on the same, to be satisfied before its removal. This sum was subscribed and paid to him ; he erected the mill, but soon after sold it to third parties with the express understanding and agreement, as the record recites, that these third parties should remove the same to another town ten miles away. At the time of the institution of this suit the mill had not

been removed from Arbela, but the parties who had purchased it from the defendant were intending and arranging to remove it at once.

This, excluding other matters which are not material, was the state of facts which existed at the time the plaintiff brought the present action for himself and as the assignee of the other subscribers to the fund of one hundred and fifty dollars, to recover the same from the defendant, on the ground that he had created a necessity for the removal of the mill, whereby the amounts subscribed became subject to re-payment. Upon this state of facts the court directed the jury to find for the defendant. It is clear that this direction was right, because, at the time when the suit was brought, a necessity had not arisen requiring the removal of the mill within the meaning of the contract. The fact that the defendant's vendees had purchased the mill with the express understanding that it should be removed to another town and without a knowledge of this lien upon it, and that they were intending at once to remove the mill to such other town, did not create such a necessity, since they were still at liberty to rescind their agreement with the defendant to remove the mill, or to waive their right to remove it. It is obvious that as long as the mill remained at Arbela, the subscribers to the fund were in possession of the right for which they had bargained, and that no threatened or concocted removal of it would give them a right of action to recover the amount of their subscriptions.

With the concurrence of all the judges, it is ordered that the judgment be affirmed.

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THOMAS H. MOFFETT, Respondent, v. CORNELIUS B. TURNER ET AL., Appellants.

St. Louis Court of Appeals, October 26, 1886.

1. TRIAL PRACTICE—ARREST OF JUDGMENT—PLEADINGS.—The same cause of action being stated, in different forms, in each of two counts of the same petition, the finding of the jury, under the court's instructions, as to one count, ignoring the other, is not ground for sustaining a motion in arrest of judgment.

2. APPELLATE PRACTICE—EVIDENCE.—The admission of evidence which could not prejudice the appellant is not ground for reversing the judgment.

APPEAL from the Clarke County Circuit Court, BEN. E. TURNER, Judge.

Affirmed.

MATLOCK, HILLER & HOWARD, for the appellants: There is a verdict on the first count of the plaintiff's petition, none on the second, and a general judgment on the petition for the plaintiff, which is erroneous. *Bricker v. Railroad*, 83 Mo. 391; *Biglow v. Railroad*, 48 Mo. 510; *Hickman v. Byrd*, 1 Mo. 495.

WOOD & MONTGOMERY and W. L. BERKHEIMER, for the respondent: That there is a verdict on the first count of the petition, is not error, as the court, in an instruction for the defendant, took from the jury the matters contained in the second count of the petition, and the jury, under the instructions, could only find on the first count; and, if it be an error, it is an immaterial one not prejudicing the defendant. At all events, both counts embraced the same cause of action, and a general verdict in such case, even if the count had been before the jury, is not error. *Owens v. Railroad*, 58 Mo. 386; *Edwardson*

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v. Garnhart, 56 Mo. 81; *Brady v. Connelly*, 52 Mo. 19; *Dougherty v. Railroad*, 62 Mo. 554.

THOMPSON, J., delivered the opinion of the court.

The plaintiff's case, as stated in the first count of the petition and developed in his evidence, is substantially this: There were three partnership firms engaged in the selling of agricultural implements, Morton & Moffett, Moffett & Turner, and subsequently Turner & Vandolah. Morton & Moffett were indebted to P. P. Mast & Co., in the sum of one hundred and thirty-six dollars. Moffett & Turner bought out Morton & Moffett, and agreed to pay the debt of Morton & Moffett to P. P. Mast & Co., as a part of the consideration of the purchase. Subsequently, Moffett, the plaintiff, sold out his interest in the firm of Moffett & Turner to Turner & Vandolah, the defendants, they agreeing to pay all debts of Moffett & Turner, including this debt to P. P. Mast & Co. The defendants did not keep this agreement, and the plaintiff was obliged to pay the debt himself, and prosecutes this action to recover the money so paid.

The evidence of the defendants, on the other hand, tended to show that they never had agreed to pay this indebtedness.

The petition contained two counts, the first stating the transaction in detail, and the second alleging the payment by the plaintiff to P. P. Mast & Co., of the sum of one hundred and thirty-six dollars, at the request of the defendants, and the failure and refusal of the defendants to repay the same.

Under the instructions of the court, the jury returned a verdict for the plaintiff under the first count, and made no finding in respect to the second count. Judgment was entered in accordance with the verdict. The defendants moved for a new trial on various grounds, some of which will be noticed, and also in arrest of judgment on the ground that the verdict was not responsive to all the issues.

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I. It is true that the verdict was irregular in not being responsive to all the issues; but the second count appears to be merely a statement in another form of the cause of action stated in the first count, to which the plaintiff's evidence was really applicable. The second count was substantially abandoned at the trial, and no prejudice, it should seem, could result from the failure of the jury to find in favor of the defendants in respect of that count. If the attention of the court had been directed to the matter, before the jury retired, the formal correction would probably have been made. But it is difficult to understand upon what principle a judgment founded on a good count in a petition ought to be arrested, because the jury failed to find an issue which was joined on another count, which merely stated the same cause of action in a different form. Where several distinct causes of action are stated in different counts in the petition, and the jury return a general verdict without stating their finding in respect of each count, the judgment will not be permitted to stand, because the parties can not know how far such a verdict disposes of the question of the defendant's liability upon each separate cause of action. *Bricker v. Railroad*, 83 Mo. 391, and cases cited. But this rule has no application where, as in this case, the different counts merely state the same cause of action in different forms (*Owens v. Railroad*, 58 Mo. 386), especially where, as in this case, the second count, stating the cause of action in different forms, is ignored and abandoned at the trial and a verdict is found under the remaining count. *Dougherty v. Railroad*, 62 Mo. 554.

II. There was no error in allowing the plaintiff to give evidence tending to show that at the time Moffett & Turner bought out Morton's interest in the property and business of Morton & Moffett, the firm agreed to settle the indebtedness of Morton & Moffett, including the debt in controversy to Mast & Co., unless it be the law that a party suing to enforce a contract is not to be allowed to prove that the contract was made.

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III. Nor was there any error in admitting the published notice of the dissolution of the partnership of Moffett & Turner, which notice recited that all accounts against Moffett & Turner would be settled by Turner. By the agreement already recited, if such an agreement was, in fact, made, this indebtedness of Morton & Moffett had become an obligation of Moffett & Turner, and the language of the dissolution notice is not restricted, as is argued, to the debts of the firm of Moffett & Turner, growing out of their ordinary trade, and it would have been error to exclude it upon such a narrow interpretation of its meaning. It tended to corroborate the other evidence of the plaintiff, and at least its effect was a fair subject for the consideration of the jury. Especially, the defendants do not seem to have been prejudiced by its admission, as they were permitted to give evidence to the effect that it referred merely to the accounts of the firm of Moffett & Turner, in their course of business, and not to the indebtedness to Mast & Co., and it was for the jury to say whether this explanation should be accepted.

The judgment will be affirmed. It is so ordered. All the judges concur.

MALINDA E. DAMERON ET AL., Plaintiffs in Error, v. NICHOLAS A. HARVEY ET AL., Defendants in Error.

St. Louis Court of Appeals, October 26, 1886.

1. APPELLATE PRACTICE—IMPERFECT RECORD.—Appellate courts will, upon suggestion by the issuance and enforcement of all necessary remedial writs, aid either party to perfect an imperfect transcript of the record.

2. ——— CLERK'S NEGLIGENCE—APPELLANT LIABLE FOR.—An appellate court having exhausted its powers, and, owing to the circuit clerk's negligence, the record still remaining so confused and unin-

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telligible that the cause can not be reviewed under the rules applicable to appellate procedure, the judgment will be affirmed.

3. ——— AGENCY.—The circuit clerk is, in contemplation of law, the agent of the appellant or the plaintiff in error, who must suffer the consequences of his negligence.

ERROR to the Lincoln County Circuit Court, ELIJAH ROBINSON, Judge.

Affirmed.

MORROW & GRAY, for the plaintiffs in error.

R. H. NORTON and HERMAN & REYBURN, for the defendants in error: A bill of exceptions does not become part of the record until it is both signed and filed; and the filing comprehends something more than a mere endorsement on the bill to that effect. There must be a proper entry by the clerk on the record. *Fulkerson v. Houts*, 55 Mo. 301; *Johnson v. Hodges*, 65 Mo. 589; *Pope v. Thompson*, 66 Mo. 661; *McGrew v. Foster*, 66 Mo. 30; *The State v. Grant*, 76 Mo. 95; *Lafolette v. Thompson*, 83 Mo. 199; *Dinwiddie v. Jacobs*, 82 Mo. 195. The record must show affirmatively that the motion for a new trial was filed within four days after the judgment; if the record fails to show that fact, the court cannot look into the bill of exceptions. *Bollinger v. Carrier*, 79 Mo. 318; *The State v. Marshall*, 36 Mo. 400; *Moran v. January*, 52 Mo. 523.

ROMBAUER, J., delivered the opinion of the court.

The primary question to be determined is whether the record of the cause before this court justifies us to enter into an examination of its supposed merits.

It appears that in an action of partition, brought by the plaintiffs in error, the trial court charged them, as they claim, erroneously, with certain advances made to them by their mother, the executrix of the estate, and, thereupon, they prosecuted their writ of error to this court. The writ was issued on the twenty-fourth of February, 1885, and in obedience thereto an instrument, purporting to be a true and complete transcript of the

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record of the proceedings in the cause, was filed in this court November 30, 1885. The transcript thus filed was incomplete, omitting part of the motions and pleadings filed in the cause. The plaintiffs in error, thereupon, applied for a *certiorari*, but it appearing that such writ, if issued, would be unavailing, because many of the original papers in the cause had been lost, mislaid, or abstracted, we denied the writ, but in lieu thereof gave leave to the parties to supply the lost papers by stipulation. It would appear that this they were unable to agree upon, whereupon, we continued the cause to enable the plaintiffs in error to supply the lost papers, by appropriate proceedings in the trial court, and upon being informed that they were thus supplied, we issued a writ of *certiorari* at the last term.

In obedience to such writ what purports to be a supplemental transcript was filed in this court on the twenty-seventh day of September, last. This transcript is not a complete transcript of the proceedings, but purports to contain the proceedings in the cause at the March term, 1886, of the trial court, presumably in an attempt to supply the lost papers, and to supplement the former bill of exceptions. It nowhere appears from any of the recitals in said transcript, that the defendants in error were present in court when the attempted substitution was made, or that they had any notice thereof, or any opportunity to be heard in regard thereto. Nor does it even appear that the substituted papers were submitted to the trial court for approval, unless an entry at the end of the transcript, bearing no date, in the following words: "Which was ordered, filed and approved by the court, and made a part of the record in the cause," can be construed to have reference to all the papers, and not to the bill of exceptions alone.

Assuming that for the purposes of our present examination, both transcripts are to be taken as transcripts of one record, and as designed to supplement each other, and we are met with the further obstacle that they are wholly irreconcilable as to dates. One transcript recites

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that the bill of exceptions was signed on the twelfth day of November, 1884, and filed on said date, whereas, the other, purporting to contain the correct bill, fails to show that it was ever filed, but recites that it was signed November 18, 1874. Assuming that 1874 stands for 1884, and the recital, if true, would disprove the allegation in the other transcript as to the filing of the bill. It nowhere appears at what exact date a motion for new trial was filed, nor does it any where appear that it was filed within four days after the rendition of the judgment.

Now, while we are anxious to afford parties an opportunity to have their controversies examined upon their merits in this court, we are not inclined to violate established rules for the review of causes, in an attempt to get at the supposed merits of any case. Such an attempt on our part, even were it consonant with the dictates of justice and not opposed to the uniform rules of practice established by the supreme court, would impose a burden on this court which would effectually check the speedy disposition of causes. We have in this cause, by orders and suggestions, during two successive terms of the court, tried to aid the plaintiffs in error to make the transcript of the record complete and intelligible. They have failed to do so. It is no answer to say that the negligence or ignorance of the circuit clerk is the cause of the interminable confusion presented by these transcripts. The clerk, in contemplation of law, is the agent of the plaintiffs in error, and, if any one, they must suffer by his negligence. *Caldwell v. Hawkins*, 46 Mo. 263; *Redway v. Chapman*, 48 Mo. 218.

It was in the power of the plaintiffs in error to have all errors and imperfections in these transcripts corrected—provided they admitted of correction—before they left the hands of the circuit clerk. This court can not correct them by indulging in a series of presumptions and conjectures unwarranted by law.

The judgment is affirmed. All the judges concur.

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ANDREW FISHER, Appellant, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Respondent. 23a 201 39a 59

Kansas City Court of Appeals, November 8, 1886.

DEMURRER TO EVIDENCE—CASE ADJUDGED.—"In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor." *Buesching v. Gas Light Co.*, 73 Mo. 219. *Held*, that in this case the plaintiff is entitled to the judgment of a jury on the case he has presented.

APPEAL from Henry Circuit Court, HON. JAMES B. GANTT, Judge.

Reversed and remanded.

The case is stated in the opinion.

MCBETH & LADUE, for the appellant.

I. The court erred in sustaining defendant's demurrer to the evidence, and withdrawing the case from the jury. *Moberly v. Railroad*, 17 Mo. App. 518; *Cannon v. Moore*, 17 Mo. App. 92; *Brink v. Railroad*, 17 Mo. App. 177; *Peart v. Railroad*, 19 Am. & Eng. Railroad Cases, 233; *Johnson v. Railroad*, 77 Mo. 546; 80 Mo. 335.

II. The court erred in refusing to set aside its judgment and ruling sustaining demurrer to evidence, and in refusing to grant a new trial. See authorities above cited.

WM. S. SHIRK and THOS. G. PORTIS, with THOS. J. PORTIS, for the respondent.

I. If from the plaintiff's own evidence, his contributory negligence plainly appears, he cannot recover. It does so appear in this case. The demurrer to the

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plaintiff's evidence was, therefore, rightly sustained. *Hixon v. Railroad*, 80 Mo. 335; *Powell v. Railroad*, 76 Mo. 80; *Kelly v. Railroad*, 75 Mo. 138; *Turner v. Railroad*, 74 Mo. 602; *Zimmerman v. Railroad*, 71 Mo. 476; *Fletcher v. Railroad*, 64 Mo. 484.

II. The cases in the 17 Mo. Appeal Reports are not, in our judgment, at all in point; nor is the case of *Johnson v. Railroad* (77 Mo. 546). The latter case is cited in *Hixon v. Railroad* (80 Mo. 341), to distinguish it from cases like this.

ELLISON, J.—This action was instituted in the circuit court of Henry county, Missouri, to recover the sum of two thousand dollars damages for an alleged injury to appellant caused by respondent, its agents, and its servants, carelessly and negligently operating its railway, and running a train of cars through the city of Clinton on its railway at an unlawful and dangerous rate of speed, and without ringing a bell, sounding a whistle, or giving any warning whatever, whereby appellant was injured.

The answer was a general denial and contributory negligence. The defendant, at the close of plaintiff's case interposed a demurrer to the testimony which was sustained by the trial court, and plaintiff appealed.

The abstracts as presented by the contending parties in this cause do not agree as to the testimony adduced at the trial, and we have examined the record proper to ascertain its true import. Our conclusion is that plaintiff is entitled to the judgment of a jury on the case he has presented. He was engaged in driving a delivery wagon in the town of Clinton, through which corporation the defendant's road runs. He testifies that on approaching the track, he checked his horse and looked and listened for a train; that seeing or hearing none he attempted to cross over, but his wagon was struck by one of defendant's engines, then passing at a rapid rate of speed, without ringing the bell or sounding

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the whistle. He did not bring his horse to a full stop, but his evidence tended to show that to be unnecessary, as there being a fresh snow on the ground, the wagon was making no noise. He especially states that he was on the look-out for the cars up to entering on the track. That he heard none, nor did he see, nor could he see any. From his evidence we are left to infer that he could not see the approaching cars on account of buildings near the track, and it is made certain by all the testimony that had defendant's servants been performing their duty as required by law, and by the dictates of ordinary prudence, plaintiff would have heard the alarm, and thus his injury prevented. Though the evidence offered in support of a plaintiff's case may be such, when taken together, as to make the ground work of strong argument to a jury that he has no legal standing, yet it will not justify taking the case from the jury. "In passing upon a demurrer to the evidence the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor." *Buesching v. Gas Light Co.*, 73 Mo. 219, 231.

The judgment is reversed and the cause is remanded. All concur.

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HENRY McGOWAN, Respondent, v. THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, November 8, 1886.

1. **Pleading—Action for Nuisance—Sufficiency of Averments.** It is not necessary, in order to maintain an action for a nuisance which has been erected by the predecessor of defendant, to allege that defendant had knowledge or notice of the nuisance. It is not necessary to allege or prove that notice of the nuisance has been

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given providing you allege and prove knowledge of its continuing existence.

3. NUISANCE—DEFENCE OF LIMITATIONS.—A nuisance is a continuous thing, and as such, is a fresh nuisance every day it is suffered to remain unabated; and though the party complaining cannot recover upon the original cause of action, after period of bar prescribed by statute; he may for its *continuance*, any time before the right of entry is barred, and recover such actual damage as has accrued within the statutory period. Angell on Limitations, sect. 300.

APPEAL from Cooper Circuit Court, HON. E. L. EDWARDS, Judge.

Affirmed.

The case and facts are stated in the opinion.

SHIRK & PORTIS, with THOS. J. PORTIS, for the appellant.

I. The petition shows upon its face that defendant did not erect the embankment and railroad track complained of, but took possession of said Missouri, Kansas and Texas railroad long after the same was erected. Under these circumstances the petition was fatally defective in not averring that plaintiff notified defendant of such obstruction. *Dickson v. Railroad*, 71 Mo. 575; *Wayland v. Railroad*, 75 Mo. 548.

II. The demurrer to the evidence should have been sustained. Plaintiff's own evidence shows that the original "obstruction" was created in the year 1873, long before the property belonged to him, and that he bought with knowledge of that fact. The cause of action accrued in 1873, and was, therefore, barred, when this action was brought.

JOHN R. WALKER, with GEO. W. JOHNSTON, for the respondent.

I. The petition is sufficient. It alleges knowledge of the nuisance by defendant, which renders it liable for

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continuance. *Pinney v. Berry*, 61 Mo. 359; *Dickson v. Railroad*, 71 Mo. 575; *Wayland v. Railroad*, 75 Mo. 548.

II. This cause of action is not barred by the statute of limitations. 3 Bl. Com. [Sharswood] 220; 1 Addison Torts [Woods Ed.] 300; Vol. 2, p. 600; *Beckley v. Skroh*, 19 Mo. App. 75; *Vedder v. Vedder*, 1 Denio [N. Y.] 257.

Ellison, J.—This action was begun in the Cooper circuit court, on the twentieth day of October, 1883.

On the nineteenth day of August, 1884, the plaintiff filed an amended petition. During the trial of the case the plaintiff dismissed as to the first count of his petition.

The second count of said amended petition is as follows:

"Plaintiff for another cause of action states that the defendant is a corporation duly created by law for railroad purposes; that on or about the twelfth day of June, 1878, the plaintiff became the owner in fee of the west half of lot number 171, on the original plat of the city of Boonville, Cooper county, state of Missouri, which said half lot abuts for a distance of one hundred and fifty feet, more or less, on First street, a public street of said city, and plaintiff has continued to own said half lot to this day.

"Plaintiff states that he erected on said premises immediately and prior to any of the grievances hereinafter mentioned, a house and other improvements for the use of himself and family as a residence and for business purposes, and prior to the grievances hereinafter mentioned said premises were of easy access from said street, and the plaintiff had the right to use and enjoy the same without let or hindrance.

"That on or about the first day of September, 1879, the Missouri, Kansas & Texas Railway Company, a corporation duly created by law, having authority to construct its road in said First street in a lawful manner,

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and not so as to obstruct the use of said street, yet wrongfully, carelessly, negligently, and in violation of plaintiff's rights, did construct in said street and immediately along side of plaintiff's aforesaid premises, an embankment of earth varying in height from six inches to three feet, and did place thereon cross ties and rails of its line of railroad; and the said construction of said embankment and the placing thereon said cross ties and rails did obstruct the use of said street by plaintiff, which use he was entitled to by law, and did entirely shut off plaintiff's way of ingress to and egress from said premises over said street.

"And afterwards, to-wit: about the first day of December, 1880, the said Missouri, Kansas & Texas Railway Company put into the possession and control of the defendant, the said line of railroad in said street, with full power and authority to continue said obstruction, and since the taking of said line of railroad by defendant as aforesaid, the defendant with knowledge of the existence of said obstruction has wrongfully, unjustly, and in violation of the plaintiff's rights, maintained, continued and kept up said embankment and other obstructions, and has thereby continued to obstruct the use of said street by plaintiff, which use he was and is entitled to by law, and has continued to shut off plaintiff's way of ingress to and egress from his said premises. Wherefore plaintiff has sustained damage at the hands of the defendant in the sum of fifteen hundred dollars," etc.

Defendant's answer was a general denial, and also set up the following defences:

"And for a further answer defendant says that if any injury was ever done to the lot or parcel of ground described in plaintiff's petition by the construction of the embankment therein described, it was done long before the plaintiff owned said lot.

"And defendant further answering says that the plaintiff's cause of action, if any he has, did not accrue

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within five years next before the bringing of this suit, and is, therefore, barred by the statute of limitations which defendant pleads in bar of the same."

Upon the trial of the case the defendant objected to the introduction of any evidence on the part of the plaintiff, for the reason that the petition did not state facts sufficient to constitute a cause of action. The objection was overruled.

Thereupon the plaintiff offered evidence tending to prove the allegations of his petition.

During the introduction of said evidence the plaintiff testified that when he bought the property in 1878 he knew that in 1873, an embankment along the west side of said lot had been constructed and a railroad track built thereon by the Missouri, Kansas & Texas Railway Company; that said track was taken up in the year 1874; that in the year 1879 the said Missouri, Kansas & Texas Railway Company raised said embankment varying in height from six inches to two feet and again laid a track thereon; that before said last mentioned track was laid he could drive over the embankment into and from his lot, but that the raising of said embankment and the placing of said track thereon in 1879, entirely cut off his ingress and egress to the rear part of his lot; that about the first day of September, A. D., 1884, the defendant had removed the track of said railroad, and that plaintiff has since cut down said embankment.

At the conclusion of plaintiff's evidence defendant prayed an instruction in the nature of a demurrer to the evidence. It was overruled.

The defendant then offered evidence tending to support the allegations of its answer.

Judgment was entered for plaintiff for three hundred dollars and defendant appeals.

I. The petition in this cause is sufficient. It is necessary, in order to maintain an action for a nuisance which has been erected by the predecessor of the de-

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fendant, to allege that the defendant had knowledge or notice of the nuisance. It is not necessary to allege or prove that notice of the nuisance has been given provided you allege and prove knowledge of its continuing existence. *Pinney v. Berry*, 61 Mo. 359, 365; *Dickson v. Railroad*, 71 Mo. 575; *Wayland v. Railroad*, 75 Mo. 548; *Beckley v. Skroh*, 19 Mo. App. 75. The petition in this cause sufficiently alleges knowledge on defendant's part of the existence and continuance of nuisance complained of. A fair interpretation of its allegations will show that it alleges a knowledge on defendant's part that the embankment, etc., was an obstruction to the free enjoyment and use of the lot.

II. The defendant invokes the statute of limitations for the defeat of plaintiff's case. An embankment had been erected for a railway track in 1873; at what particular time of the year does not appear. This suit was begun in October, 1883. But this embankment, as shown by the evidence, did not constitute an obstruction to the lot. The track was torn up in 1874 and in 1879 the embankment was raised and the track again laid, the raising and relaying the track making the obstruction complained of. Under this state of the evidence I think the statute cannot avail defendant. A nuisance of the sort described in this action is a continuous thing, and as such "is a fresh nuisance every day it is suffered to remain unabated. New suits for the damage caused by its continuance may, therefore, be brought from day to day." Cooley on Torts, 619; Blackstone, 3 Book, 320.

I am aware that a wrong which, though originally a nuisance, may ripen by use into a right. The law applicable to cases of such nature is well stated by Angell on Limitations, section 300, where he says: "Every continuance of that which was originally a nuisance the law considers a new nuisance, and, therefore, though the party complaining cannot, in an action on the case, recover upon the original cause of action, after the expira-

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tion of six years, he may for its continuance, any time before the right of entry is barred, as above mentioned, and recover not only nominal damages, but such actual damage as has accrued any time within six years."

Our statute, of course, prescribes a different period than six years. We see no reason for disturbing the result of the trial and affirm the judgment. All concur.

JOHN S. BROWN AND JANE E. BROWN, Respondents, v. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, November 8, 1886.

1. PRACTICE—DEMURRER TO EVIDENCE—INSTRUCTIONS.—Where the facts in evidence are submitted to the jury by proper instructions; and the evidence justified the issues submitted by the instructions; the finding of the jury is binding upon this court.

2. ——— INSTRUCTIONS—DAMAGES—HUSBAND AND WIFE—CASE ADJUDGED.—Where, as in this case, the husband was a nominal party, the action having been instituted to recover the damages *sustained by the wife*, the damages recoverable were the damages personal to the wife. *Held*, that the instruction, on that point, in this case, was calculated to mislead the jury, as not containing a full and complete statement of the true measure of damages.

APPEAL from Clinton Circuit Court, HON. GEO. W. DUNN, Judge.

Reversed and remanded.

Statement of case by the court.

This was an action by plaintiffs, who were husband and wife, for the recovery of damages sustained by the wife by reason of the defendant's failure to erect and

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maintain a good and sufficient crossing as required by law where the defendant's railroad crossed a certain described public road.

The plaintiffs' evidence tended to show that the crossing was unsafe and dangerous. One of the plaintiffs' witnesses, Thomas Wright, testified as follows:

"Am, and for ten years have been road overseer of my district in Jackson township. The crossing is in my district, am well acquainted with it; live one quarter of a mile from it. Road was there before railroad was built. Saw Mrs. Brown at the time she was injured. She was badly hurt. The planks on sides of the rails at crossing about nine feet long; depth of fill, about nine feet; length of approach to crossing, about thirty feet; very abrupt on left side, and traveled wagon track is about eighteen inches from the edge of the embankment. Unless one is careful in going over the crossing, he is liable to turn there. No macadam; just dirt. If team shies the least bit, it is liable to turn the wagon over. On north side the dirt approach is about even with the south end of the plank on the south side. On west side the roadway is about nine feet wide, the length of plank crossing. To be entirely safe from the embankment on south side, you must drive off the plank on the ties on the north side. I told Nolan, defendant's roadmaster, two years before the accident, if he would throw a couple of car loads of dirt in there the crossing would be a good one, and safe. I saw track of wagon when I went over. It began to slide immediately after leaving the rail. It passed over the planks at the proper place. Approach is on a slight curve and twenty-five or thirty feet long."

The female plaintiff testified as follows:

"Am John S. Brown's wife. I was driving a wagon and team of two horses across the railroad track. I saw I was falling, wagon, horses and all. The wagon began to slide, and then turn over, just as it left the railroad track. The wagon went over, and I was caught under it. Husband got me out. I remember but little after

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that. Was taken to Mellon's. Remained till Wednesday following. During nearly all that time I was confined to bed. Have not yet thoroughly recovered from the effects of the injury; was treated by physicians; health good before that; suffered great pain in back and shoulders and hips."

The husband testified among other things to the following: "The accident occurred on the west side of the crossing. The approach is six to ten feet wide. I had just crossed with my wagon without accident. I saw defect in crossing and avoided it. If she had seen it she could have come down all right. Some difficulty in driving across when a man is using care. If wagon should slip to one side it would be dangerous. Don't know of wife's team shying. The team was a quiet one."

There was no other testimony introduced by either party, as to the manner in which the accident happened.

The plaintiffs introduced other testimony touching the character of the crossing, tending to corroborate the testimony on that point hereinbefore set out. The defendant introduced testimony tending to show that the crossing was reasonably safe.

For the plaintiffs the court gave among others the following instruction:

"3. If the jury find for plaintiffs they will assess such damages as they will believe to be a reasonable and fair compensation to them for the injuries of said Jane Brown, including her physical pain and mental anguish and suffering which has been the direct result of such injuries, not exceeding the sum of five thousand dollars."

The jury found in favor of plaintiffs in the sum of two thousand dollars.

STRONG & MOSMAN, THOS. E. TURNEY, for the appellant.

I. The court erred in overruling defendant's demurrer to the evidence. If the plaintiff, by the exercise

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of ordinary care, could have avoided the injury, then the plaintiff cannot recover. *Buesching v. St. L. Gas Light Co.*, 73 Mo. 219; *Barton v. Railroad*, 52 Mo. 553. It it appears without any conflict of evidence, or by the cross-examination of plaintiffs' witnesses, that she did not exercise ordinary care, and that this want of ordinary care contributed proximately to the injury, it is the duty of the trial court to take the case from the jury. *Buesching case, supra; Whiteacre v. Railroad*, 35 Ohio St. 627; *Hays v. Gallagher*, 72 Pa. St. 140; Wharton Negl., sects. 425–427.

II. The *third* instruction given for plaintiff is erroneous. It directs the jury to assess the damages by *both plaintiffs* by the injuries of Jane Brown. Only the damages sustained by the *plaintiff, Jane Brown*, could be recovered in this suit, and a separate suit must be brought for the damages of the husband. *Smith v. St. Joseph*, 55 Mo. 456. Under the evidence the *only* elements of damages were the suffering, etc., of Jane Brown, but the instruction treats these as one, or rather as incident of the damages to be assessed.

III. The motion for a new trial should have been sustained for the reasons already given and because the jury disregarded the instructions given on the issue of ordinary care; and the verdict was against the evidence, and the damages were excessive.

THOMAS J. PORTER, for the respondents.

I. In passing upon a demurrer to the evidence, the court is required to make every inference in favor of the plaintiff which a jury might, with any degree of propriety, have inferred in his favor. When there is a complete failure of evidence, or admitting all the facts, if a verdict would violate common sense, and obvious reason, the court should interfere. But to authorize such *interference*, the evidence must not only be weak, but in fact there must be no evidence. 17 Mo. App. 195; *Wilson v. Board of Education*, 63 Mo. 137. Un-

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less it clearly appears from plaintiffs' evidence, without any contradiction, that the plaintiff, Jane E. Brown, was guilty of such contributory negligence as would preclude a recovery, defendant's demurrer to the evidence was rightfully overruled. *Barton v. Railroad*, 52 Mo. 253; *Buesching v. Gas. Co.*, 73 Mo. 219.

II. This court will not reverse because of erroneous instructions unless the appellant is injured thereby. 17 Mo. App. 197; Rev. Stat., sect. 3775. It cannot be reasonably contended that the jury did include or consider any damages not recoverable in this action unless we believe that they did so in the face of the whole record. There is no pretense that any proof was admitted or offered as to any other damages; and it is impossible that the jury considered in their estimate damages not claimed in the petition, and concerning which they could have no knowledge because of the total absence of any evidence.

Hall, J.—The only points made in this court by the defendant for the reversal of the judgment herein, are: That the trial court improperly refused to give an instruction in the nature of a demurrer to the evidence, asked by the defendant; and that the trial court improperly gave instruction number three for the plaintiffs.

I.

In support of its first point it is contended by the defendant that it appears from the evidence introduced by the plaintiffs themselves that the wife was guilty of negligence proximately contributing to cause the injury complained of. It is argued that this is true because from all the evidence concerning the nature of the crossing, the character of the team driven by the wife, the time of day at which, and the manner in which the accident happened, it is impossible to escape the conclusion that if the wife had used ordinary care the accident would not have occurred.

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The court below submitted to the jury, by proper instructions, the questions, whether the crossing was reasonably safe, whether the wife was injured by reason of the crossing having been unsafe, and whether the wife was at the time of the accident exercising reasonable care. No objection is urged here to the form of the instructions submitting those questions. In fact the instructions were more than fair to the defendant because they imposed npou the plaintiffs the burden of proving the exercise by the wife of reasonable care at the time of the accident. The evidence fully justified the court in submitting to the jury the question whether the crossing was reasonably safe. The finding by the jury, that the crossing was not reasonably safe, is binding upon us. The wife had the right to presume that the crossing was reasonably safe, and to act upon such presumption. It may be that the evidence did show that, had the wife known the condition of the crossing, she could have safely driven across it by the use of reasonable care.

But the evidence did not show that she knew the condition of the crossing, and we will not assume that she did know of such condition. It was proper, therefore, for the trial court to submit to the jury the question whether the wife was in the exercise of reasonable care, and to overrule the demurrer to the evidence.

II.

In this case the husband was a nominal party, the action having been instituted to recover the damages sustained by the wife.

The damages recoverable in this case were the damages personal to the wife. It is conceded that the damages sustained by the husband in consequence of the injuries done to the wife were not recoverable in this case. But the plaintiffs' counsel contends that no harm resulted from the instruction on the measure of damages directing the jury to assess such damages as they might

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believe to be a reasonable and fair compensation to *plaintiffs* for the injuries of the wife, because the jury could not have understood the language of the instruction to include the damages resulting to the husband in consequence of the wife's injuries.

The argument being that the wife's damages are "*for her injuries*," and the husband's damages "*are such as result to the husband in consequence of her injuries*;" and that it cannot be maintained that the jury interpreted the instruction, directing them to assess such damages as might compensate the plaintiffs for the wife's injuries, to include damages done to the husband in consequence of those injuries.

In this case, as it was proper for the purpose of showing the character of the wife's injuries, the plaintiffs introduced evidence of the time during which the wife was confined to her bed and room on account of her injuries, and of the treatment of her therefor by physicians. We are of the opinion that the instruction, especially in connection with such evidence, was calculated to lead the jury to believe that they should in making their verdict consider the damages sustained by the husband in consequence of the wife's injuries.

The instruction was all the more calculated to so influence the jury, because, after directing them if they should find for plaintiffs, to assess such damages as they might believe to be a reasonable and fair compensation to the *plaintiffs* for the injuries of the wife, the instruction continued, "*including* her physical pain and mental anguish and suffering which has been the direct result of such injuries."

The physical pain, mental anguish and suffering endured by the wife in consequence of her injuries were the principal items of the damages personal to herself, and if at the time of the trial she had fully recovered from her injuries they were the only items of such damages. The special mention by the instruction of those items of the damages

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to be assessed by the jury, in the absence of a full and complete statement of the true measure of damages, and in connection with the direction to the jury to assess such damages as they might believe to be a reasonable and fair compensation to the plaintiffs (both husband and wife) for the wife's injuries, was certainly calculated to lead the jury to include in their verdict damages belonging to the husband as well as those personal to the wife. And it is impossible for us to say that the jury did not so do.

For the error indicated the judgment is reversed and cause remanded. All concur.

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HARRISON FELL, Defendant in Error, v. THE RICH HILL COAL MINING COMPANY, Plaintiff in Error.

Kansas City Court of Appeals, November 8, 1886.

1. NEGLIGENCE—MASTER AND SERVANT—APPLICATION OF DOCTRINE OF RESPONDEAT SUPERIOR—CASE ADJUDGED.—By section 6, of the act approved March 23, 1881 (Laws Mo. p. 167), the owner, agent or operator of every coal mine is required, under penalty, to provide a cage for lowering into and raising from the coal shaft the men engaged in digging the coal, provided with a spring catch to arrest the rapid descent of the car. By section 5, of said act, it is declared that the "term 'owner' used in the act shall mean the immediate proprietor, lessee or occupant of any coal mine, or any part thereof," etc. *Held*, that the object of the act was to extend the ordinary meaning of the term "owner," so as to make it, for the purpose in view apply to a party operating the mine under contract with the actual owner. But this will not acquit the actual owner who has engaged another to open his mine, reserving to himself the obligation and burden of furnishing the operating machinery, and to this extent the relation of master and servant exists between him and an employe of the person operating the mine under contract.

2. PRACTICE—THEORY AT THE TRIAL—CASE ADJUDGED.—Where it ap-

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pears, as in this case, both from the evidence and the instructions asked and given by the court, that the case was tried throughout on the assumption of a particular state of facts; it is the settled rule of practice in the supreme court of this state, that the party complaining must stand or fall by the theory on which he tried the case in the court below.

3. MASTER AND SERVANT—RULE GOVERNING THE RELATION.—"The relation of master and servant does not cease so long as the master reserves any control, or right of control over the method and manner of doing the work, or the agencies by which it is to be effected." Thompson on Negligence, 907, sec. 29.

4. PRACTICE—VERDICT FOR THE RIGHT PARTY—RULE CONCERNING. Where the verdict is for the right party, and could not have been otherwise, except through a disregard of the evidence by the jury, the verdict will not be disturbed although there may have been error committed at the trial touching some other matter not essential to a recovery.

5. CONTRIBUTORY NEGLIGENCE—MUST BE RAISED BY PLEADING AND INSTRUCTIONS—EXISTENCE OF IT A QUESTION OF FACT.—In order that a defendant avail himself of the defence of contributory negligence, it should be raised by the pleadings and presented to the jury by instructions. Whether there was such negligence, is upon the evidence, a question of fact for the jury, and when they have passed upon it, under proper instructions, this court will not disturb their finding.

6. DAMAGES—PHYSICAL AND MENTAL SUFFERING AN ELEMENT.—The *physical and mental* suffering and pain of the plaintiff, consequent upon the injury, are elements properly entering into the estimation of damages. *Randolph v. Ry.*, 18 Mo. App. 609; *Cook v. Ry.*, 19 Mo. App. 329.

ERROR to Bates Circuit Court, HON. JAMES B. GANTT, Judge.

Affirmed.

Statement of case by the court.

This is an action to recover damages for personal injuries. The defendant is a corporation. The plaintiff was working as a miner in one of defendant's coal shafts. The petition alleges that the injury resulted from defendant's negligence in not furnishing and hav-

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ing in charge of the engine, used in lowering into and hoisting from the coal pit the men employed in digging coal, a competent and careful engineer to operate said engine, and in failing to have the cage so used for letting the men down and bringing them up from the pit sufficiently covered with boiler iron, and in failing to have the drum to said cage sufficiently provided with brakes to prevent accident in case of giving away of machinery, and neglecting and failing to provide said cage with spring catches to prevent the consequence of the cable breaking or loosening, or disconnecting of machinery. The petition alleges that while the plaintiff was descending into the coal pit in said cage, through the incompetency and carelessness of defendant's engineer in managing the machinery, and the absence of said catch, the cage fell rapidly, greatly injuring the plaintiff, breaking his leg, dislocating his ankle, and otherwise wounding him. He prayed judgment for ten thousand dollars.

The answer was a general denial. At the trial, had before a jury, the plaintiff's evidence tended to show that one Jones was the regular engineer of defendant in charge of the engine employed in running the cage, and other machinery about the premises; that at the time of the accident, without plaintiff noticing who was in charge of the engine, the said engineer had absented himself from his post of duty, and placed in charge his fireman. That while descending in the cage it suddenly went very rapidly, carrying plaintiff to the bottom with such force that he was injured in the manner stated in the petition. The fireman in charge of the engine gave as a reason for the mishap that "he went to fire and steam stopped the engine." The evidence, without contradiction, showed that the cage was not provided with spring catches, and that such catches were for the purpose and so arranged that in case the cable broke, or machinery became disconnected or loosened, they clamped on sledges and stopped the cage. The evidence

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was that had these catches so been on the cage they would have arrested the descent of the cage, and prevented the injury to plaintiff. The evidence further showed that defendant's superintendent had, previous to the time of the accident, been notified by the county inspector of coal mines of the absence of such catches and requested to put them on.

The defendant put in evidence a contract previously entered into between it and one McCombe, by which it was stipulated that said McCombe was to sink a shaft in this mine for coal, to dig and deliver to defendant so much coal per month, at an agreed price; said McCombe was to furnish tools, labor and necessary materials and work in opening the shafts, entries, drifts, etc., for using, operating and keeping said mine in repair. The defendant was to furnish an engine and all necessary apparatus and appliances for hoisting coal out of the shaft, and an engineer to operate the engine, and iron for tracks, all materials, such as shafting, timbering, ties, props, aprons, screens, caps, etc.; to erect a blacksmith shop and forge, and furnish the same. McCombe hired and paid the hands.

The jury returned a verdict for the plaintiff, assessing his damages at one thousand eight hundred dollars. Defendant has appealed.

DEARMOND & SMITH, for the plaintiff in error.

I. The court erred in allowing plaintiff to amend his petition at the trial.

II. Instruction numbered four, given of the court's own motion, is not the law, and is not based upon or warranted by the evidence. This refers to the question of ownership and the providing of safe machinery. *Gibson v. Ry. Co.*, 46 Mo. 168; *Harper v. Ry. Co.*, 47 Mo. 571; *Cousins v. Ry. Co.*, 66 Mo. 573; *Sherman v. Ry. Co.*, 72 Mo. 65; *Flynn v. Ry. Co.*, 78 Mo. 212; *State v. Wheeler*, 79 Mo. 336; *Heirn v. McCaughan*, 32 Miss. 17. It misconstrues the contract between McCombe and

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defendant. Lindley on Partnership [4 Ed.] 2-4; *Musser v. Brink*, 63 Mo. 242, and 80 Mo. 350; *Donnell v. Harshe*, 67 Mo. 170; Wood's Master and Servant [1 Ed.] sections 311, 215, 317; *Russell v. Columbia*, 74 Mo. 492; *Hilsdorf v. St. Louis*, 45 Mo. 98; *Fink v. Mo. Fur Co.*, 82 Mo. 281; 2 Thomp. Neg., sect. 21, p. 899; *Ardesco Oil Co. v. Gibson*, 63 Pa. St. 163; *Moore v. Sanborn*, 2 Mich. 519. It erroneously predicates plaintiff's right of recovery upon his being "ignorant of such defects at the time" of the accident. *Mathews v. Elevator Co.*, 59 Mo. 474; *Cagney v. Ry. Co.*, 69 Mo. 416; *Porter v. Ry. Co.*, 71 Mo. 66; *Flynn v. Ry. Co.*, 78 Mo. 204. No definition is given of "willful" or of "direct damages." *Stewart v. Clinton*, 79 Mo. 603.

III. The other instructions for plaintiff are abstractions, or concerning subjects on which there is no evidence. Another instruction given for plaintiff makes *mental* pain and suffering an element of damages without its being pleaded. Brown's Legal Maxims [7 Ed.] 654.

IV. Defendant's instructions should have been given.

V. The verdict is against the evidence, and weight of evidence, and is against the law, as declared.

VI. The motion for a new trial should have been sustained.

M. L. BROWN and A. A. HARRIS, for the defendant in error.

I. The court committed no error in allowing the amendment to the petition at the trial, no demurrer thereto having previously been filed. *Merrell v. St. Louis*, 83 Mo. 244; *Henderson v. Henderson*, 55 Mo. 534; sect. 3567, Rev. Stat.; *Ensworth v. Barton*, 67 Mo. 622; *Webber v. Hannibal*, 83 Mo. 262.

II. The duty to furnish the safety appliances, and persons, being cast by express statute, plaintiff in error cannot escape liability by contracting out the work of

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mining the coal. Wood's Master and Servant (1877) sect. 321; Thomp. Neg., sect. 21, p. 904; *Speed v. Ry. Co.*, 71 Mo. 303; *Reed v. Ry. Co.*, 60 Mo. 199; *Currier v. Lowell*, 16 Pick. (Mass.) 170; *Reynolds v. Hindman*, 32 Iowa 140; *Davis v. Ry. Co.*, 121 Mass. 134; *Ry. Co. v. Currier*, 19 Ohio St. 1; *Farnham v. Ry. Co.*, 55 Pa. St. 62; *Ry. Co. v. Werner*, 49 Miss. 725.

III. The owner is liable to the party injured when the injury results directly from the acts which the *contractor* is authorized to do. Defendant is liable under the express terms of its contract with McCombe. *Ingersoll v. Ry. Co.*, 8 Allen (Mass.) 438; *Ry. Co. v. Woodby*, 85 Ill. 372; *Water Co. v. Ware*, 16 Wall. (U. S.) 566; Wood's Master and Servant (1877) sect. 316; Thomp. Neg., sect. 28, p. 906; Whar. Neg. 227.

IV. Defendant had the employment and control of the engineer. If the engineer placed the fireman in charge of the engine, this was an act within the scope of his employment, and if any injury resulted by and from his negligence and incompetency, defendant is liable. Wood's Master and Servant, sect. 308; *Althorf v. Wolfe*, 22 N. Y. 355; *Moore v. Ry. Co.*, 85 Mo. 588; *Wichtrecht v. Fassnatcht*, 17 La. Ann. 166. McCombe was not an independent contractor so as to hold defendant exempt. *Speed v. Ry. Co.*, 71 Mo. 903; Thomp. Neg., sect. 40, p. 913; *Whitney v. Clifford*, 46 Wis.; 8 Rep. 34; *Tiffin v. McCormack*, 34 Ohio St.; 9 Rep. 21. But even if plaintiff was an employe of the contractor, the engineer was the admitted employe of the defendant. The relation of fellow servant did not exist between said engineer and plaintiff, and under the authorities, defendant is liable. Thomp. Neg., sect. 41, p. 1040; *Speed v. Ry. Co.*, 71 Mo. 303; *Cayzer v. Taylor*, 10 Gray (Mass.) 274.

V. Defendant had notice, through his superintendent, and its agent (McCombe), of the defective condition of the machinery, and it was not incumbent on plaintiff to notify them, or to quit work, if he had so known it.

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Conroy v. Vulcan Iron Works, 62 Mo. 35; *Porter v. Ry. Co.*, 71 Mo. 66; *Coal Co. v. Taylor*, 81 Ill. 590. Operating the mine with defective appliances. and the unfit service was wilful negligence. *Coal Co. v. Taylor, supra; Braxton v. Ry. Co.*, 77 Mo. 458; *Walsh v. Trans. Co.*, 52 Mo. 534. Where the defective machinery may be used by exercise of reasonable care, the servant does not assume the risk. *Conroy v. Iron Works*, 62 Mo. 35; *Flynn v. Ry. Co.*, 78 Mo. 195; *Walsh v. Transp. Co.*, 52 Mo. 434.

VI. Mental suffering may be recovered, although it is not alleged. Thomp. Neg., sect. 5, p. 1250; *Wright v. Compton*, 53 Ind. 337; *Cook v. Ry. Co.*, 19 Mo. App. 329.

VII. The contract with McCombe is not a lease, and can have the effect only to put McCombe in charge as the person having the care and management of the mine on behalf of defendant. Martindale on Conveyances, 255; *Whitney v. Clifford, supra; City of Tiffin v. McCormack, supra.*

PHILIPS, P. J.—I. The principal contention of defendant, raised at this bar, is, that the relation of master and servant did not exist between defendant and plaintiff, and, therefore, the doctrine of *respondeat superior* does not apply. It is urged that McCombe was an independent contractor, under the mining company; that he hired, paid and controlled the men employed in the shaft, without any control or supervision on the part of defendant over this matter.

The conclusion drawn from this premise would follow but for another important fact in the record. The imputed negligence of defendant consists in two independent facts: the negligence of defendant in providing an unsafe cage for lowering into and raising from the coal shaft the men employed in digging the coal, and second, the incompetency and negligence of the person in charge of the engine at the time of the accident. As

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to the first ground, there is scarcely any room to question the fact that had the cage been provided with the necessary spring catch the injury to plaintiff would not have occurred. Notwithstanding the competency or incompetency, the negligence or care of the engineer in lowering the cage, had it been provided with the spring catch the rapid descent of the car would have been arrested so as to have saved plaintiff from his misfortune. That this catch was absent at the time of the injury there is no dispute. The only practical question, therefore, for determination is, was it the duty of the defendant to have provided this safeguard?

By section six, of the act approved March 23, 1881 (Laws Mo., p. 167), the owner, agent or operator of every coal mine is required, under penalty, to provide such cage with such spring catch. Appellant, however, insists that both by the provisions of said act and the special contract between it and McCombe this duty was devolved upon McCombe. Section three of said act declares that: "'The term 'owner' used in this act shall mean the immediate proprietor, lessee or occupant of any coal mine, or any part thereof, and the term 'agent' shall mean any person having, on behalf of the owner, the care or management of any coal mine, or any part thereof."

The evident object of this provision, in carrying out the humane and protective object of the act, was to extend the ordinary meaning of the term "owner" so as to make it, for the purpose in view, apply to a party situated as was McCombe to this transaction, so far as the public was concerned. But it ought not, on well settled principle, to be so construed as to acquit the actual owner of the mine, who has engaged another to open his mine, reserving to himself the obligation and burden of furnishing and operating that part of the machinery which occasions the injury to the employe. This duty he owes to the public, and when he undertakes to so furnish and operate the machinery, which he knows will be used for a specific purpose in performing his part of the

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contract with the contractor in opening and operating his mine, the law, in the absence of any such statutory requirement, would impose upon him the duty of providing reasonably safe machinery and appliances, and as to that the relation of master and servant existed between him and the plaintiff employed in mining in this shaft.

Waiving any question as to whether the plaintiff was bound by the unrecorded and undisclosed provisions of the private contract between defendant and McCombe, and also whether the contract admits of the construction, as contended for by defendant, that defendant was not to furnish the cage and operate it, it is sufficient to say, both from the evidence and the instructions asked by defendant, and given by the court, the case was tried throughout on the assumption that the cage was furnished by defendant and run by its engineer. This, no doubt, was the actual fact, and, therefore, no question was made of its existence at the trial. It is now the well settled rule of practice in the supreme court of this state that the party complaining must stand or fall by the theory on which he tried the case in the court below. *Davis v. Brown*, 67 Mo. 313; *Noble v. Blount*, 77 Mo. 241; *Walker v. Owens*, 79 Mo. 568; *Holmes v. Braidwood*, 82 Mo. 610–17.

As already stated, the defendant having reserved to, or taken upon, itself the duty of furnishing the cage and engineer to operate it, it was not only the owner of the mine to that extent, but the law affixes to it the relation of master toward the employe who, in the usual course of his employment, had to use such machinery. There is, in such case, no repugnance between the relation of the owner of the mine and the contractor that the relation of master and servant cannot exist between the former and the employe of the contractor. As to that part of the machinery, which the owner of the property is to furnish, the doctrine of *respondeat superior* must necessarily exist for the proper protection of the em-

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ploye. *Detroit v. Corey*, 9 Mich. 165; *Sadler v. Henlock*, 4 El. & Bl. 570; *Hefferman v. Benkard*, 1 Robt. 436; *Griffiths v. Walfram*, 22 Minn. 185.

"The relation of master and servant does not cease so long as the master reserves any control, or right of control, over the method and manner of doing the work, *or the agencies by which it is to be effected.*" *Speed v. Ry. Co.*, 71 Mo. 308; Thompson on Negligence, p. 907, sect. 29.

In *Mulchy v. Relief Society* (6 Rep. 751), it is held that where a proprietor who engages with a contractor to paint his building, the proprietor to furnish the staging for such purpose, he must furnish a safe staging therefor; and if such staging break, injuring an employe, the proprietor must answer therefor, although the staging was built by an independent contractor.

The evidence in this case shows that defendant, through its superintendent, had its attention called to the absence of the spring catch. It does not appear at any time to have disclaimed its proprietorship of this machinery. Not until after the plaintiff had been injured through its disregard of this notice, and a jury had awarded the plaintiff damages therefor, and not until the case stood here on appeal, did it seem to occur to counsel that possibly defendant might escape responsibility by appealing to the language of the special contract between it and McCombe.

II. We shall not discuss the other branch of the imputed negligence as to the incompetency and negligence of the fireman left in charge by defendant's engineer. The verdict is amply sustained by the uncontradicted evidence on the other branch of the case. Where the verdict is for the right party, and could not have been otherwise, except through a disregard of the evidence by the jury, the verdict will not be disturbed, although there may have been error committed at the

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trial touching some other matter not essential to a recovery.

III. It is also urged that plaintiff was guilty of contributory negligence. The ground for this contention is that plaintiff knew, at the time of the injury, of the absence of the spring catch. This rests upon the statement of plaintiff in his testimony that: "There was no catches on the cage; had been before, but were taken off; do not know how long had been off, but some time."

It would be sufficient to say that no such defence of contributory negligence was raised by the answer, nor was any such question presented to the jury by any instruction asked by defendant. On the contrary, the instructions given by the court expressly required the jury to find that plaintiff was without fault contributing to his injury. By their verdict the jury negatived the existence of such contributory negligence.

Whether or not the language of the witness implied that he knew of the absence of the catches prior to, or whether he was stating a fact which came to his knowledge after the accident, or whether, if he knew the catches were absent, he had sufficient knowledge of their importance to reasonably believe it dangerous for him to start down in the cage without such safeguard, were all questions of fact for the jury. The defendant does not seem to have attached any importance to this matter, as it raised no such question by its instuctions. The jury having passed on the matter, under the instructions given by the court, we cannot disturb their finding.

IV. It is finally objected by defendant that the court erred in instructing the jury, that the physical and mental suffering and pain of plaintiff consequent upon the injury were elements to enter into the estimation of damages. The objection is lodged against the word "mental" employed in the instruction. We had occasion to consider this question in *Randolph v. Railroad* (18 Mo. App. 609), and in *Cook v. Railroad* (19 Mo. App. 329). Adhering to the ruling in those cases we must

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overrule the objection. In the action of tort for personal injuries to an adult, mental suffering is so allied to and consequent upon physical pain that it seems to me to be quite impossible to separate them in practice. So fixed is this union in the mind that an instruction which should direct a jury, in estimating the damages, to dissociate mental from physical pain and agony would be the very acme of carrying the most abstruse metaphysics of the schoolman into the practical deliberations of the jury room.

Such an instruction, as the one under consideration, was given in the case of *Loewer v. City of Sedalia*, without challenge by the supreme court, although the learned counsel for appellant pressed every conceivable meritorious point as ground for reversal.

The other judges concurring, the judgment of the circuit court is affirmed.

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THE NATIONAL WATER WORKS COMPANY OF NEW YORK, Respondent, v. THE SCHOOL DISTRICT OF KANSAS CITY, Appellant.

Kansas City Court of Appeals, November 8, 1886.

1. PRACTICE—NON-SUIT—EFFECT OF AND AS TO WHETHER AN ESTOPPEL FROM NEW ACTION.—By the common law practice the plaintiff could take a non-suit at any time before the jury returned a verdict. Under the code (section 3556, Revised Statutes) a non-suit is, in effect, a dismissal of the action, and this may be done at any time before the final submission for the verdict of the jury. A *voluntary* non-suit, taken by the plaintiff any time before the judgment, will not estop him to bring a new action. Much more so should this rule apply where the non-suit is *enforced* by an adverse conclusive ruling of the court.

2. THE SCHOOL DISTRICT OF KANSAS CITY—ITS RELATION TO THE CITY

GOVERNMENT—CASE ADJUDGED.—The School District of Kansas City is an independent corporation in every vital particular. The title and control of the school buildings are effectually vested in the board of school directors — the school district corporation. * * * The city government has no voice nor agency in the matter. It has nothing whatever to do with the school buildings or other property of this incorporated district. The city neither builds, owns, nor controls the school houses. It cannot pass a single valid ordinance respecting them. They are, therefore, not "public buildings" of the city.

3. CASE IN JUDGMENT—CONSTRUCTION OF CONTRACT BETWEEN CITY OF KANSAS AND THE NATIONAL WATER WORKS COMPANY OF NEW YORK.—The plaintiff corporation owned and operated the water works of Kansas City under a contract between it and the city, entered into pursuant to authority granted by an act of the general assembly of the state, and as a part of the consideration of granting the franchise to plaintiff to furnish pure water for said city, it was stipulated that plaintiff should, at all times thereafter, supply water free of charge "for all public buildings and offices of said city." *Held*, that as the city did not erect the school buildings, nor control them, and as it did not use or take water therefor, defendant—The School District—is not within the terms of the exemption expressed in the contract.

APPEAL from Jackson Circuit Court, HON. TURNER A. GILL, Judge.

Affirmed.

Statement of case by the court.

This is an action to recover of the defendant compensation for water furnished it by plaintiff between the first day of July, 1880, and the first day of January, 1881, for the use of certain designated school buildings situate within the corporate limits of the city.

The answer pleaded that the plaintiff corporation owned and operated the water works of Kansas City under a contract between it and the city, entered into pursuant to authority granted by an act of the general assembly of the state, and that as a part of the consideration of granting the franchise to said company to furnish pure water for said city, it was expressly stipulated that the plaintiff should at all times thereafter

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supply water free of charge for all public buildings and offices of said city. It is then alleged that the school buildings, to which the water in question was furnished, are public buildings within the terms of this contract and are, therefore, exempt from water rates.

The answer then further pleaded a former recovery between the same parties on the same cause of action. The basis for this plea rests on the admitted fact, that in April, 1881, long prior to the institution of this action, the plaintiff brought suit against the defendant in the United States circuit court for the western division of Missouri, to recover judgment on the same cause of action, wherein the same defence was interposed first above stated. That on a trial had therein, before a jury, at the conclusion of the evidence, the court instructed the jury to the effect that under the pleadings and evidence the plaintiff could not recover. Thereupon the plaintiff took a non-suit, and afterwards, within due time, filed its motion to set aside said non-suit, which motion, after argument and consideration, the court overruled.

On demurrer interposed by defendant the court struck out this last defence.

The cause was submitted for trial to the court sitting as a jury. The section of the contract between the city and the water works company is as follows: "The city may also use and take, and the company is to suppy from the water works, as now constructed and hereafter extended, water for use in all public buildings and offices of the city, and for any fountains the city may erect on the public ground, and for any drinking places the city may choose to erect in any portion of the city, and for basins for watering stock from waste water out of such fountains, * * * said company shall not have any pay or compensation for water the city may so use or take, other than the hydrant rent, to be paid as by this ordinance is provided."

The following facts were agreed upon at the trial:

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"1. That both plaintiff and defendant are corporations.

"2. That the plaintiff erected and is now operating in the City of Kansas, with pipes extending beyond the limits of the city, a system of water works, and that it is authorized so to do by ordinances number 10,524 and 14,776 of said city, and said ordinances may be considered as read in evidence and the acceptance of the company.

"3. The public schools were established and have been organized under acts of the legislature, incorporating city in 1853, acts 1861, 1863, 1866, 1867, and following years, *and during that year 1867*, *under the law as then existing*, a board of education was elected, consisting of W. E. Sheffield, E. H. Allen, J. A. Bachman, A. A. Bainbridge, E. H. Spaulding, and Patrick Shannon, *and the system as then organized* has been continued ever since under the several changes that have taken place in the law during the time.

"4. *Ever since the school district was organized, in 1867*, it has embraced territory outside of the city limits.

"5. The school buildings of defendant at present time are as follows: Washington, Humboldt, Lathrop, Morse, Franklin, Woodland, Central, Benton, Switzer, Chase, Karnes, Martin, Lincoln, and Sumner. And of these, the Martin, having three rooms, and the Woodland, twelve rooms, are situated outside of the city limits, and the date of the erection of these several school houses is as follows:

"Washington, in 1867; Humboldt, in 1868; Central, in 1868; Lathrop, in 1869; Franklin, in 1869; Morse, in 1870; Benton, in 1870; Woodland, in 1871; Lincoln, in 1879; Karnes, in 1880; Switzer, in 1881; Chase, in 1881; Martin, in 1883; Sumner, in 1883.

"6. The following houses now take water from plaintiff, and the dates of commencing are as follows:

"Central, January 1, 1877; Washington, January

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1, 1877; Humboldt, November, 1875; Franklin, November, 1875; Lathrop, November, 1875; Benton, November, 1875; Lincoln, July 1, 1878; Woodland, September 27, 1882; Switzer, September 28, 1883; Sumner, November 12, 1883.

"7. The water taken was all paid for by defendant until July 1, 1880, at which time defendant was taking and using water in the Franklin, Lathrop, Humboldt, Central, Washington, Lincoln, and Benton schools, and so continued to take in said houses from July 1, 1880, to January 1, 1881, and if defendant is liable, the amount sued for during said period is correct."

The court found the issues for plaintiff, and entered judgment accordingly. Defendant has appealed.

GAGE, LADD & SMALL, for the appellant.

I. The court erred in sustaining the demurrer to the *second* defence pleaded in the answer. That defence was a valid plea of *res adjudicata*. The decision in that case was a final judgment; it was "the final determination of the rights of the parties in the action." Rev. Stat., sect. 3672; *Collier v. Weldon and wife*, 1 Mo. 1; *Chiles v. Wallace*, 83 Mo. 84; *Moody v. Deutsch*, 20 Cent. L. J. No. 13, p. 33. In such cases as this, there is no non-suit in the proper sense of the word. By taking a voluntary non-suit a plaintiff goes out of court absolutely and finally. But when he says, I take a non-suit with leave to move to set it aside, or accompanies his non-suit with such a motion, he does not, in fact, take a non-suit; he still holds on to the court and the defendant, and litigates further. The effect of this proceeding is merely to waive the formality of an adverse verdict, to admit that the jury will do as the court has already directed, and to submit his case, in the most favorable manner for himself, to the court, as matter of law. Submitting his case in that manner, the decision is no less final or binding than if made upon demurrer or verdict.

II. The court also erred in refusing to declare the

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law as asked by defendant. The public school buildings of the city were, in fact, public buildings of the city even though the management and control and the title to the property had been vested by law in a separate board. The management, property and funds belonging to the schools of Kansas City, were originally vested in the municipal corporation. Subsequently, in order to separate them from politics, they were committed to the charge of different officers from those who managed the other affairs of the city. In other words the city was incorporated over again for *school purposes*, and the school property belonging to the city for the purposes of better management was transferred to the new board. This branch of the municipal administration has been continued ever since in this separate organization, but it has always, and is to-day, just as much a part of the city government as the police board. In a proper and just sense Kansas City still has public schools and public school buildings, and it is not to be doubted that in fact it was the intention and meaning of this contract to include the school buildings within the city, in the term "public buildings of the city."

KARNES & ESS, for the respondent.

I. From 1861 to the present time the corporation known as the "City of Kansas," and that known as the "Kansas City School District," have been entirely distinct, and neither having any control over the affairs of the other, or any interference therewith in any way. These school houses were only in part buildings *in* the city, and in no sense whatever could they be said to be buildings *of* the city.

II. The language of the ordinance contract is "public buildings and offices of the city." This could not mean such buildings *in the city*, as this would include all *located in the city*, as the postoffice, custom house, county court house, etc. The city intended to provide

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for its *own buildings and offices*, and made no provision for *other public buildings*.

III. As to so much of the school district as was embraced within the limits of the city, there were two corporations, occupying the same territory, at the same time. This can be done. Dillon on Mun. Corp. [3 Ed.] sect. 24. Though the school district may take the name of the city, there is scarcely any limit to the territory which it may embrace on the outside, and this can be legally done. *State v. Board Ed. Appleton City*, 53 Mo. 127; *State v. Miller*, 65 Mo. 50; *Henry v. Dulle*, 74 Mo. 443; *State v. Heiser*, 60 Mo. 540.

IV. The record in this case shows that the plaintiff took a non-suit before the case was submitted to the jury. As soon as the court announced what the instructions would be the non-suit was taken. This it had a right to do. *Hensley v. Peck*, 13 Mo. 587; *Templeton v. Wolf*, 19 Mo. 101; *Lawrence v. Shreve*, 26 Mo. 492; *Benoist v. Murrin*, 48 Mo. 52. After the non-suit had been taken in the United States court, plaintiff could have commenced a new suit at once in the same court. *Homer v. Brown*, 16 How. [U. S.] 354; *Insurance Co. v. Broughton*, 109 U. S. 121.

V. To constitute a judgment a bar to a subsequent suit, it must appear to have been a decision on the merits of the case—a judgment of non-suit is not a decision of the merits. *Taylor v. Larkin*, 12 Mo. 103; *Wells v. Moore*, 49 Mo. 229.

PHILIPS, P. J.—I. The first question, in the order of its effect, to be considered is the plea in bar. It is conceded by the learned counsel for appellant that plaintiff had the right, upon the adverse instruction by the court, to take a non-suit, and that had it taken no further action thereon, the judgment of non-suit would have been no bar to this action. But their contention is that by moving the court to set aside this judgment of non-suit, the plaintiff thereby called in review the ruling

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of the court on plaintiff's right to maintain the action, and the overruling of this motion was, in effect, a final adjudication on the merits; that it was a final judgment, from which, under our state practice, an appeal would lie, and if not appealed from, or further prosecuted by writ of error, the judgment was conclusive.

This proposition is enforced with plausible argument, but it is not sustained by any adjudication, and, so far as our observation extends, it is not in accord with the common understanding of the profession and the usage of the courts.

Section 3556, Revised Statutes of Missouri, declares that: "The plaintiff shall be allowed to dismiss his suit or take a non-suit at any time before the same is finally submitted to the jury or to the court sitting as a jury, or to the court, and not afterwards."

Section 914, Revised Statutes of United States, declares that: "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state in which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

By rule forty-five of the United States circuit court, in which said cause was so tried, it is provided, that: "The plaintiff shall be allowed to dismiss his suit or take a non-suit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterward."

Laying aside any consideratian of said sule forty-five, we are justified in assuming that either the common law rule of practice was in vogue in the United States court, or that it so construed the federal statute above quoted as to apply said section 3556, Revised Statutes of Missouri, to its procedure. By the common law practice the plaintiff could take a non-suit at any time before the

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jury returned a verdict. Under the code a non-suit is, in effect, a dismissal of the action. This may be done at any time before the final submission for the verdict of the jury. 2 Hayne's New Trial and Ap., sect. 113. Bigelow on Estoppels, page 32, says: "A voluntary non-suit, taken by the plaintiff any time before judgment, of course, will not estop him to bring a new action." Much more so should this rule apply where the non-suit is enforced by an adverse conclusive ruling of the court.

Freeman on Judgments, section 261, says: "A non-suit is but like the blowing out of a candle, which a man at his own pleasure may light again. Under no circumstances will such a judgment be deemed final, whether entered before or at the trial. That such a judgment was entered by the court upon an agreed statement of facts, will not give it any force as an estoppel." *Homer v. Brown*, 16 How. 354; *Derby v. Jacques*, 1 Cliff. 432.

The force of this rule is made apparent when it is recalled that a motion for non suit by a defendant is a waiver of his right to have judgment on the merits, or to litigate new matter set up in his answer, for it is equivalent to a dismissal of the action with defendant's consent. Freeman on Judgments, sect. 261*a*.

As the non suit was enforced it is not comprehensible, to my mind, how the motion to set it aside, and the action of the court in overruling it, altered the plaintiff's status in respect of its right to re-institute the suit. By its ruling the court, in effect, took the case from the jury before its final submission. As the amount involved was less than the sum essential to entitle plaintiff to an appeal to the United States Supreme Court, the motion for review of the ruling of the court had no such object in view; but was simply in accord with the general practice in such cases, to allow the court an opportunity, on further consideration, to re-consider its ruling, and allow the plaintiff to go to the jury on the merits. The effect of sustaining the motion, had the court seen fit to do so, would not have been to enter

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final judgment for the plaintiff, but simply to reinstate the cause for trial; and the parties would have been entitled to a *venire de novo*.

It being an action at law the plaintiff was entitled to a trial by jury; and until the case went to the jury for its verdict there could be no final submission or judgment on the merits. All the trial court could do, if the law of the case was with the defendant, was to direct the verdict of the jury on the facts. Its mere declaration of law was not a final submission, nor was its refusal to allow plaintiff's motion such submission and determination on the merits. Until submission to the jury, the right to take a non-suit was guaranteed to plaintiff, and when taken no action by the court could determine the merits of the case, so as to cut off the privilege of the plaintiff to relight his candle.

We, therefore, hold that the demurrer to this part of the answer was properly sustained.

II. The remaining and graver question is, are the public school buildings, situate within the corporate limits of the City of Kansas, public buildings of the city, within the sense of the contract between the city and the water works company?

It is not questioned by opposing counsel that the language of the contract, "public buildings of the city," implies such buildings as belong to, or are controlled by the city government, and subject to its jurisdiction.

Otherwise it would be extended to any public building which chanced to be situated in Kansas City, and would embrace the county court house and jail, or the United States Custom House and post office, with which the city government has no connection, and to which it is under no obligation to supply water for any purpose.

A brief review of the history of legislation concerning public schools, in their relation to this city, may be valuable in the solution of the question to be answered.

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The fostering of popular education has ever been an object sought by both the federal and state governments. As early as June, 1812, Congress enacted:

"Section 1. That the rights, titles and claims to town or village lots, out lots, common field lots, and commons, in; adjoining and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Village a Robert, Carondelet, Ste. Genevieve, New Madrid, New Bourbon, Little Prairie, and Arkansas, in the territory of Missouri, which lots have been inhabited, cultivated or possessed prior to December 20, 1803, shall be and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their respective rights, etc.

"Section 2. That all town or village lots, out lots or common field lots included in such survey, which are not rightly owned or claimed by any private individual, or held as commons belonging to such towns or villages, or that the president of the United States may not think proper to reserve for military purposes, shall be and the same are hereby reserved for the support of schools in the respective towns or villages aforesaid," etc. See sec. 1, vol. 2, p. 748, U. S. Stat.

This legislation, in addition to the purpose to subserve the cause of education, was prompted by a sense of equity to secure to the designated communities the benefit of certain commons appurtenant to the towns and villages at the time of the acquisition by the government of the Louisiana territory. It was proper enough that the state legislature, in granting charters of incorporation to the designated towns and villages should recognize the object and spirit of the federal enactments so as to secure to the local community the benefit of the reservation. This was the case, as will be observed by a reference to the acts of the legislature respecting the city of St. Louis. But, from that dearth of invention and disregard of appropriateness which not infrequently

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characterizes the formulating of such acts, we find that in some charters granted by the legislature, like that of the city of St. Joseph, it was enacted as follows:

"Section 1. All powers heretofore granted to the trustees of the town of St. Joseph over and relating to the commons thereto attached and belonging, are hereby vested and continued in the mayor and councilmen of the city of St. Joseph, created by this act; and the said mayor and councilmen shall have power to manage, lease and sell any or all of said commons in fee-simple on such terms and conditions as they may provide by ordinance, and invest or use the proceeds thereof for the benefit of such city."

"Section 2. The mayor and councilmen shall have power to sell in fee-simple, lease, regulate or otherwise dispose of all lots of ground and all money or property to which the inhabitants may be entitled for the benefit of schools; and may take all necessary steps to maintain suits to recover the same, or effect compromise with conflicting claimants; and to appropriate such money or property in such manner as they may consider advantageous to the support of the schools."

Subsequently, in 1853 (Laws Mo. 1853, p. 244), the legislature in incorporating Kansas City, adopted the second section of the act pertaining to the city of St. Joseph. As Kansas City was not in existence at the time of the congressional act in question, in 1812, and as there was not appurtenant to it any such property designated by the act of congress, the said provision inserted in its charter was purely imitative, and possesses little importance in the solution of this controversy. Said section two, of the act incorporating the city of St. Joseph, can hardly be regarded as conferring absolute control over the public schools and buildings on the city government.

In the Revised Statutes of 1855, article eight, ch. 143, the legislature sought to put into practical operation the school system in towns and villages coming within the

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purview of the act of congress. The first section declared that the lands and lots so granted by the United States to the inhabitants of the enumerated towns and villages should remain a continual fund to be inviolably appropriated to the support of common schools in said towns and villages.

The second section provided that: "The inhabitants of any such town or village, not heretofore incorporated for school purposes, may be incorporated for such purpose in the manner hereinafter provided."

The third section authorized the county court, on the petition of a given number of inhabitants to incorporate it for school purposes.

Assuming to act under this enabling statute, although it had no application to Kansas City, the county court of Jackson county subsequently made an order designating "The Kansas City School Incorporation."

In 1861 (Laws of Mo. 1861, p. 762), the legislature declared that this corporation should be known as the "Kansas City Board of Public Schools," with perpetual succession, etc.

Without either affirming or denying that this act made the school board an integral part of the municipal corporation of Kansas City, one thing is clearly manifest, both from the general statute of 1855, and the special act of 1861, and that is, it was the purpose and policy of the legislature towards schools thus erected in towns and villages, to so far divorce them from the municipal body as to give over their control and management to a separate board of directors, duly incorporated as a body politic.

Thus stood the law, so far as it affects this inquiry, until 1865, when, by chapter 47, General Statutes, 1865, it was provided, that any incorporated city, town, or village, not then governed as to schools by any special law, might be organized, for school purposes, into and established as a single school district, in the manner thereinafter specified. This statute declared that the directors

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should be a body corporate, by the name of the "Board of Education."

In 1867 (Laws Mo. 1867, p. 160), the legislature revised and enlarged the provisions of the school law, concerning schools in cities, towns and villages. It is inferable from the agreed statement of facts that this school district accepted and organized under the act of 1867. The school buildings in question were erected thereafter.

There have since been additional enactments embodying and preserving the substantial provisions of the act of 1867, among which is one changing the corporate name of the body to "The School District of" the given city, town or village. This school district now bears the latter corporate name, which is additional proof that it organized under the general school law.

By section six, of the act of 1867, the directors of such school district are constituted a body corporate, by the given name, "and as such and by such name shall receive all moneys and other property belonging or accruing to said district or to said city, or town or village, or to any part of the same, for the use and benefit of the public schools therein; and the said board shall be capable of contracting and being contracted with, suing and being sued, pleading and being impleaded in any court, etc.; and shall also be capable of receiving any gift, grant, bequest or devise, for the use of the public schools of said city, etc.; and all moneys accruing to said district for school purposes shall be paid over to the treasurer of said board upon the order thereof."

Section seven provides that "said board shall make rules and regulations for the government of its own proceedings, and shall have charge and control of the public schools and the property appropriated to the use of the same within said district; shall have power by order or resolution, * * * to levy and collect taxes upon all property within said district for the erection and maintenance of school buildings, and carrying and conduct-

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ing of schools therein; * * * and to make and enforce all needful rules and regulations for the government and management and control of such schools and property as they may think proper."

Section eleven confers authority on this board to sell any school house and the lot belonging thereto, when they deem proper, and to reinvest the same in another lot or building.

By this act, I am of opinion, the divorcement of the school district of Kansas City from the municipal government is complete.

It is an independent corporation in every vital particular. The title and control of the school buildings are effectually vested in the board of school directors, the school district corporation. The school board determines all questions as to the raising of money for revenue. The county officers are the agents by which the revenue is collected. The city government has no voice nor agency in the matter. It has nothing whatever to do with the school buildings or other property of this incorporated district. It has nothing to do with furnishing or equipping such buildings. It does not supply them with fuel or water. It has no power or authority to say whether the public schools shall use Kaw, Missouri river or cistern water.

This belongs exclusively to the school board, the district corporation. The city neither builds, owns nor controls the school houses. It cannot pass a single valid ordinance respecting them. To say, therefore, that such buildings are of the city is to mock the legislature and the statute.

It is further worthy of observation, that in 1867 (Laws Mo., 1867, p. 165-6), the legislature authorized the extension of city, town and village school districts so as to embrace territory beyond the limits of the municipal corporation. And the agreed statement of facts shows that ever since the act of 1867, the school district

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has embraced territory outside of the city limits. This affords additional evidence, to my mind, of the purpose of the legislature to make the school district a distinct and separate legal entity from the municipal organization.

It is true, as suggested by the learned counsel for appellant, that it is not uncommon for laws to recognize the right of municipal corporations to exert their powers beyond their territorial limits. But this will be found, usually, to be in the exercise of the police power, as a means of repelling disorder from within by suppressing it from without, when so near as to render this precaution wise. Sometimes, also, as a means of internal welfare and development, municipal corporations, by special enabling acts, may extend improvements or lend aid thereto, beyond their corporate limits.

But in all this the municipal body acts for and through itself, through its own legislative body and ministerial officers, and is directly responsible for the abuse of the exercise of this agency.

So, too, it may be conceded, that in the operation of the machinery of municipal governments it occurs, for purposes of greater efficiency, that there is something akin to the distribution of powers, or sub-letting their exercise; such as the organization of fire companies, sanitary boards and police commissioners in cities. Yet these are but parts and agencies of the general municipal government, with responsibility for their acts, and the power of legislation respecting them reserved in the municipal body. The municipality provides and furnishes them quarters and compensation. Not so in respect of this school district. As already stated, it is an independent body corporate. No suit is maintainable against the city for its contracts or acts. It has no jurisdiction over the school or its property. It makes no provision for housing, equipping or maintaining the school. It can make no prescription as to the character of public building to be used by the district. It contributes nothing towards their erection. It can maintain

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no action of ejectment for the recovery of their possession against any intruder. It can maintain no action for trespass upon such property.

Because of the peculiar needs and surroundings of mural society, the legislature makes special laws applicable to such localities distinguishable from rural districts. This is all. Having no jurisdiction over, nor ownership of, nor responsibility for the school buildings, it would, it seems to me, be violative of well recognized rules of construction to hold that such buildings were reasonably within the contemplation of the parties to the contract in question.

The other specifications of the contract, by the rule: *noscitur a sociis*, are confirmatory of the position that it was in the mind of the parties to exempt the city only where, but for the exception the burden of supplying water would fall upon the city: "For any fountain *the city may erect*, and for any drinking place *the city* may choose to *erect*, and for basins for watering stock * * *; such company shall not have any pay or compensation for water *the city may so use or take*."

As the city did not erect the school buildings, nor control them, and as it did not use or take water therefor, the conclusion is irresistible that the defendant is not within the terms of the exemption expressed in the contract.

It follows that the judgment of the circuit court should be affirmed. The other judges concurring, it is so ordered.

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HATTIE STREETER, Respondent, v. CITY OF BRECKENRIDGE, Appellant.

Kansas City Court of Appeals, November 8, 1886.

1. MUNICIPAL CORPORATION — DEFECTIVE SIDEWALK — LIABILITY TO KEEP IN REPAIR — CASE ADJUDGED. — Where a sidewalk was constructed in the street, and with the knowledge of the officers of a city used by the public for purposes of travel for many years, it matters not that the city did not construct the sidewalk: it was the duty of the city to have *removed* or *kept it in repair*. And it was the duty of the city to have kept it in repair, although the other portion of the street was sufficient for public use and convenience.

2. ——— NEGLIGENCE — PRACTICE — INSTRUCTIONS — COMMON ERROR. In a case, such as this, it is proper to submit to the jury, "whether when a part of the sidewalk is defective through negligence, is the other part, which is not defective, sufficient, and reasonably safe and convenient for the travel thereon." *Tritz v. Kansas City*, 84 Mo. 632. And where the instructions asked by defendant are guilty of the same fault as charged against plaintiff, defendant is not in a position to complain of the action of the court in this respect.

3. WITNESSES — COMPETENCY OF — CASE OF PHYSICIAN AND PATIENT. Under section 4017, Revised Statutes, a physician is not competent, against plaintiff's objection, to testify concerning any information acquired by him from his patient, by word of mouth or by an examination or inspection of his patient, while attending him as a physician, which information was necessary to enable him to prescribe for such patient. And so, also, as to any information, so acquired by the physician, concerning the cause of his patient's condition: it is not competent for the witness to tell, indirectly, that which the statute forbids him to tell directly.

APPEAL from Caldwell Circuit Court, HON. JAMES M. DAVIS, Judge.

Affirmed.

Statement of case by the court.

This was an action for the recovery of damages on

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account of injuries to the plaintiff alleged to have been caused by the negligent failure of defendant to keep the sidewalk on one of its streets in a reasonably safe condition.

The street in question was and had been for many years in constant and general use. Upon the street near the place of the accident was the post office. The sidewalk had been constructed many years prior to the accident. There was no evidence that the city had ordered the construction of the sidewalk by ordinance. The sidewalk was a board sidewalk, and, as the evidence introduced by the plaintiff tended to show, was in an unsafe condition. The sidewalk had been in general use ever since its construction.

The defendant examined Doctor Donaldson as a witness. The defendant claims that there was error in the rulings of the trial court shown by the following excerpts from the record:

"Doctor Donaldson testified: 'I know the plaintiff. Was called to see her in 1883. I am a physician and surgeon. Was called May 15, 1883, as a medical attendant.'

"Witness was then asked what was her condition, and what medicine he prescribed for her. Plaintiff objected to the question and the court sustained the objection."

The bill of exceptions shows that Doctor Donaldson was recalled and testified: "I was called in as plaintiff's physician and served in that capacity for several months. I prescribed for her and examined her as to her physical condition."

"The defendant then propounded the question to him: 'What, if anything, was the cause of plaintiff's troubles?'

"Plaintiff's counsel objected to the question and to allowing witness to answer the same. The objection was sustained and the court refused to allow witness to answer the same.

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"Defendant then asked witness if from his knowledge of plaintiff's condition he would attribute her disability in any way to any fall she may have received in May, 1883. Plaintiff's counsel objected to the question and the court refused to allow the witness to answer the same.

"Defendant then asked witness whether he could, independent of any *disclosure made to him by plaintiff* while his patient, state the cause of her sickness or suffering. Plaintiff's counsel objected and the objection was sustained.

"The defendant then asked witness to what extent hysteria was the source of plaintiff's troubles, and what was the extent of her disability. To each of these questions objections were made and sustained.

"Witness was then asked whether, when he was first called as a physician, plaintiff informed him that she had fallen, or attributed her then condition to such a fall. Objection was made and sustained to the question."

The plaintiff had judgment and the defendant has appealed.

CROSBY JOHNSON and F. H BRADEN, for the appellant.

I. Municipal governments cannot delegate their powers. Corporate powers can only be exercised by the authorities specified in the charter. Cooley on Const. Lim. *204; Dill. Mun. Corp., sect. 212, p. 360; *St. Louis v. Clemmons*, 43 Mo. 389; *Thomas v. Boonville*, 61 Mo. 282; *Saxton v. Beach*, 50 Mo. 488.

II. Corporate authorities can only exercise their powers relating to streets by ordinance. Parol evidence is not competent to prove the existence or contents of an ordinance nor the duties of officers. *Stewart v. Clinton*, 79 Mo. 603; *Thompson v. Springfield*, 61 Mo. 282; *City v. Miller*, 66 Mo. 467; Rev. Stat., sect. 5001.

III. While a city is in duty bound to keep its

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streets free from obstructions and impediments which would endanger travelers, it is under no obligation to put down or maintain walks for their accommodation, until its government has, by ordinance, recognized the necessity and imposed upon the city such duty. *Blake v. St. Louis*, 40 Mo. 569; *Smith v. St. Joseph*, 45 Mo. 449; *Bowie v. Kansas City*, 51 Mo. 454; *Craig v. Sedalia*, 63 Mo. 417; *Haire v. Kansas City*, 76 Mo. 438; *Bassett v. St. Joseph*, 53 Mo. 290. The power to establish sidewalks involves the exercise of legislative powers and the city cannot be compelled to exercise the power. *Tritz v. Kansas City*, 84 Mo. 632; *Keating v. Kansas City*, — Mo. —.

IV. A city is only bound to keep in repair so much of its streets as may be necessary for the traveling public. *Bassett v. St. Joseph*, *supra; Tritz v. Kansas City*, *supra*. Whether defendant failed in its duty of keeping the street in proper repair was a question for the jury. *Craig v. Sedalia*, *supra*.

V. The physician was a competent witness as to the extent of plaintiff's disability. *Linn v. Ins. Co.*, 8 Mo. App. 363. Unless the disclosure was designed to aid the physician in prescribing for his patient it is not privileged. *Collins v. Mack*, 31 Ark. 684; *Campen v. North*, 39 Mich. 606.

C. H. MANSUR, also for the appellant.

I. There is in this case no evidence that the city had ever, by ordinance, undertaken to regulate the street; nor any evidence that its authorities had adopted any ordinance for the establishment of the sidewalk, and as the *mode* for exercising its powers is prescribed by its charter, it follows that the walk was not a public or city sidewalk. Dillon Mun. Corp., sects. 244–47, 610; *Cross v. Morristown*, 18 N. J. Eq. 305.

II. The court erred in excluding the evidence of the witness, Donaldson, a physician, and refusing to allow him to answer the several questions propounded to

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him. None of the evidence called for was privileged. *Campen v. North*, 39 Mich. 606; *Railroad v. Martin*, 41 Mich. 571; *Edington v. Ins. Co.*, 77 N. Y. 564.

CHAPMAN, and BROADDUS & WAIT, for the respondent.

I. The city has the power to construct and repair sidewalks. It is responsible whether it exercises the power or not. *Salisbury v. City of Ithaca*, 94 N. Y. 27; *City of Richmond v. Long's Adm'r*, 17 Gratt. [Va.] 375; *Oliver v. City of Kansas*, 69 Mo. 79; *Allbritain v. Mayor*, 60 Ala. 486; *Barnes v. Dist. Columbia*, 91 U. S. 540; *Cleveland v. St. Paul*, 18 Minn. 279; *Haire v. City of Kansas*, 76 Mo. 438; Cooley on Torts, 625; Dillon Mun. Corp., sect. 789.

II. If a stranger erects a sidewalk and the city fails to *repair or remove it*, the city is liable. And if a city is obliged to take charge of a street, and remove or repair sidewalks therein, then, having, *by law*, charge of it, they have, *in fact*, charge of it; and are responsible to the same extent as if it had been formally and legally laid out. Dillon Mun. Corp. [3 Ed.] sect. 1099; *Oliver v. City of Kansas, supra; Haire v. City of Kansas, supra; Honfe v. Town of Fulton*, 34 Wis. 619; *Barnes v. Town of Newton*, 46 Iowa, 567; *Lafayette v. Lorson*, 73 Ind. 367; *Stark v. Lancaster*, 57 New Hamp. 88; *Sewell v. City of Cohoes*, 75 N. Y. 45.

III. A city may become responsible for its streets which become such by prescription or dedication. *Waterman v. Cuin*, 4 Paige (N. Y.) 510; Washburn on Easements, 128, 157. And when the evidence shows a *defective sidewalk* it is not requisite to give notice of the *particular plank* causing the injury. *Weisenburg v. City of Appleton*, 26 Wis. 56; *Aurora v. Williams*, 90 Ill. 61. In this case the city had notice, and the evidence of it is conclusive. *Boone v. City of Richmond*, 75 Mo. 437; *Russell v. Columbia*, 74 Mo. 80; *Springfield v. Doyle*, 76 Ill. 202.

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IV. Dr. Donaldson, respondent's physician was not competent as a witness, in this case. *Wiler v. Ins. Co.*, 190 Ind. 92; *Gartside v. Ins. Co.*, 76 Mo. 446; *Gratton v. Ins. Co.*, 92 N. Y. 274; *Johnson v. Johnson*, 4 Paige (N. Y.) 460; *Briggs v. Briggs*, 20 Mich. 34. Besides the testimony, in the medical evidence, was immaterial, and hence harmless; and there being evidence to support the verdict this court will not reverse. Sect. 3775, Rev. Stat.; *Birney v. Sharp*, 78 Mo. 73. Besides the judgment is right, and will not be reversed for error committed against respondent. *Lewis v. Curry*, 74 Mo. 51; *Moore v. Mount Castle*, 72 Mo. 605.

V. It is the duty of a municipal corporation, through its officers and agents to repair a defective sidewalk with all reasonable diligence after its unsafe condition is known to it, or onght to have been known to it, or its officers. Dill. Mun. Corp. [3 Ed.] sect. 1294; *Donseizer v. Cook*, 40 Ind. 69; *Requa v. Rochester*, 45 N. Y. 129; *Rapho v. Moore*, 68 Pa. St. 404; *Aurora v. Hillman*, 90 Ill. 61. After streets are *opened* they and sidewalks must be kept in repair. *Bassett v. St. Joseph*, 53 Mo. 290; *Craig v. Sedalia*, 63 Mo. 417.

VI. This court will not reverse even for error in the instructions where appellant is not injured and the verdict is absolutely for the right party. *Noble v. Mount*, 77 Mo. 235; *Porter v. Harrison*, 52 Mo. 524.

HALL, J.—The court instructed the jury that it was the duty of the defendant to have kept the sidewalk in a reasonably safe condition. The defendant's counsel urge that such was not the duty of the defendant unless she had, in the manner prescribed by her charter, ordered the construction of the sidewalk, and unless, further, there was not in a reasonably safe condition, outside of the sidewalk, sufficient of the street for public use and convenience. The point, then, is made that for the two reasons named the court erred in declaring, as a

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matter of law, that it was the duty of the defendant to have repaired the sidewalk.

It is conceded that, if the defendant had constructed the sidewalk, it would have been her duty to have repaired it, except only for the second of the reasons named above. The sidewalk was constructed in the street, and with the knowledge of defendant's officers it was used by the public for purposes of travel for many years before the accident. Under such circumstances it matters not that the defendant did not construct the sidewalk; it was the duty of the defendant to have removed or kept it in repair. So long as the defendant permitted the sidewalk to remain in the street and to be used by the public as a sidewalk, the sidewalk was the sidewalk of the defendant. *Salisbury v. City of Ithaca*, 94 N. Y. 27; *Oliver v. City of Kansas*, 69 Mo. 79; *Haire v. City of Kansas*, 76 Mo. 438.

The sidewalk was the portion of the street set aside for the exclusive use of pedestrians. *Oliver v. City of Kansas*, *supra*. And it was the duty of the defendant to have kept the sidewalk in repair although the other portion of the street was sufficient for pnblic use and convenience.

In so holding we do not conflict with the rule established in this state that it is the duty of a municipal corporation only to keep in repair so much of a street as may be necessary for public use and convenience. *Craig v. City of Sedalia*, 63 Mo. 417; *Bassett v. St. Joseph*, 53 Mo. 290; *Tritz v. Kansas City*, 84 Mo. 632. Having prepared a certain portion of a street for the use of pedestrians and the other portion of the street for the purpose of other travel, a municipal coporation will not be permitted to excuse itself for a failure to keep in repair the portion prepared for the use of pedestrians on the ground that the other portion was sufficient for the travel of pedestrians as well as all other travel. The pedestrians have a right to use the portion of the street prepared for their use, unless such portion of the street be in such a

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dangerous condition, known to them, as to make it negligent to use it.

The question of plaintiff's contributory negligence was properly submitted to the jury, and we will not disturb their finding upon that question.

In *Tritz v. Kansas City*, *supra*, it was held that in a case such as this it is proper to submit to the jury the question "whether when a part of the sidewalk is defective through negligence, is the other part," which is not defective, sufficient and reasonably safe and convenient for the travel thereon." The Tritz case contains the last expression of the opinion of the supreme court upon the question, and is controlling upon us without regard to what may be our opinion upon the question. The instructions given by the court for the plaintiff ignored, it is true, the question which, according to the Tritz case, the court should have submitted to the jury. But the instructions asked by the defendant were all guilty of the same fault, and for this reason the defendant is not in a position to complain of the action of the court in this respect.

Dr. Donaldson was examined as a witness by the defendant. Under section 4017, Revised Statutes, the witness was not competent, against plaintiff's objection, to testify concerning any information acquired by him from the plaintiff by word of mouth or by an examination or inspection of her while attending her as a physician, which information was necessary to enable the witness to prescribe for her. *Gartside v. Ins. Co.*, 76 Mo. 446; *Linz v. Ins. Co.*, 8 Mo. App. 363.

The plaintiff's condition, and the extent of her injuries were facts necessary, of course, to enable the witness to treat her, and information concerning such facts acquired by the witness from the plaintiff while attending her as a physician was clearly within the statute. And so do we hold as to any information so acquired by the witness concerning the cause of the plaintiff's condition. Because, while it perhaps may be true, that it

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was not necessary for the witness to have known such cause in order to have prescribed for the plaintiff, the witness could not well have testified to such cause without throwing some light on the plaintiff's condition. The witness could not have told the cause of the condition without also telling to a certain extent the condition.

The cause and the effect were so connected that to tell the one was also to tell the other in a measure. The same may be said as to the medicine prescribed by the witness for the plaintiff. It was not competent for the witness to tell indirectly that which the statute forbade him to tell directly. *Norton v. Moberly*, 18 Mo. App. 457.

The witness was asked whether he could independently of any *disclosures made to* him by the plaintiff while his patient state the cause of her sickness or sufferings. To the question the court sustained an objection. The defendant would not seem to have been harmed by the ruling of the court, for it does not appear that the defendant offered in evidence any information had by the witness independently of such disclosures. But in addition to that, the information to communicate which the witness was competent was not such as he possessed, acquired independently alone of *disclosures made to* him by the plaintiff, but was such as the witness possessed, acquired independently, not only of such disclosures, but also of any examination or inspection of the plaintiff made by the witness for the purposes already named. Had the defendant desired the information, if the witness had any such, which it was competent for him to give, the defendant should have plainly asked for it.

We think that the court properly sustained the objections made to the questions asked the witness by the defendant.

It is unnecessary for us to notice the points made by the defendant as to the action of the court in over-

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ruling certain objections made by the defendant to certain evidence offered by the plaintiff, because under the views expressed in this opinion such evidence was harmless.

Judgment affirmed. All concur.

C. H. MACE, Respondent, v. SAMUEL VENDIG, Appellant. 23 253 153a 638

Kansas City Court of Appeals, November 8, 1886.

MONEY BET ON ELECTION—ACTION TO RECOVER—PLEADING—SUFFICIENCY OF PETITION.—In an action to recover money bet on an election, under section 5720, Revised Statutes, the petition averred that in October, 1884, defendant induced plaintiff to bet one hundred dollars on the result of an election held in November, 1884, under the constitution and laws of this state, for the office of representative in the general assembly of the state of Missouri; that said one hundred dollars was staked against a like sum, and after said election defendant claimed to have won said one hundred dollars, and the same was delivered to and received by defendant, without any consideration or value to plaintiff. *Held*, that as no objection was made to this petition except by motion in arrest of judgment, it was sufficient, although not as specific as it should be, and objection made in time, on this ground, might have been sustained. The petition, though defective, is good after verdict. *Sybert v. Jones*, 19 Mo. 87, *distinguished*.

APPEAL from Cedar Circuit Court, HON. CHARLES G. BURTON, Judge.

Affirmed.

BULLER & LAY, for the appellant.

In a suit to recover a wager on an election, the petition must state the particulars of the transaction. *Sybert v. Jones*, 19 Mo. 86. The petition in this case does not state any of the particulars. It does not state

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whether the bet was that Fox would be elected or defeated, and if so to what office. Neither is the matter at all elucidated by the evidence. The motion for new trial, and in arrest, ought to have been sustained.

No brief for the respondent.

ELLISON, J.—This action is to recover money bet on an election. The plaintiff recovered in the court below, and defendant appeals. No instructions were offerred on either side. Nor was there any objection to testimony. The point is made that the petition fails to state a cause of action, and that the evidence is not sufficient to support the finding of the court.

The petition is as follows: "Plaintiff states that the defendant, on or about the —— day of October, 1884, induced plaintiff to bet and wager one hundred dollars on the result of an election to be held, and was held, on the fourth day of November, 1884, under the constitution and laws of the state, to-wit: for the office of representative of Cedar county, Missouri, and upon Thomas A. Fox, who was then and there a candidate for the office of representative of the general assembly of the state of Missouri, and against Clement N. Jourdan, who was also a candidate for said office. That said one hundred dollars was then and there staked against a like sum, and after said election the said Samuel Vendig claimed to have won said one hundred dollars, and the same was on the —— day of October, 1884, delivered to the said defendant, and that he received the same without any consideration or value to the plaintiff. Wherefore he prays judgment for said sum against said defendant and for costs."

As no objection was made to this petition except by motion in arrest of the judgment we are inclined to hold it sufficient. It is not so specific as it should be and had objection been made by plaintiff in time, he would doubtless have been sustained. In the case of *Sybert v.*

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Jones (19 Mo. 87), objection was made to evidence being received under the answer. Here the question is whether the petition, though defective, is good after verdict, and we think it is.

The evidence we deem sufficient to sustain the finding, and, therefore, affirm the judgment. All concur.

KERSEY COATES, Respondent, v. J. C. ACHESON ET AL., Appellants.

Kansas City Court of Appeals, November 8, 1886.

1. HOTEL AND BOADING HOUSE KEEPERS—LIEN UPON BAGGAGE, ETC.—CHARACTER OF.—By the provisions of section 3198, Revised Statutes, a lien is given to hotel, inn and boarding house keepers, upon the *baggage* and other valuables of their guests or boarders brought into such hotel or boarding house by such guests, etc., and upon the *wages* of such guests, etc., for their charges for boarding and lodging, etc. But the lien is created by the statute, and did not exist at common law.

2. ——— ——— PROVISIONS FOR ENFORCEMENT OF—JURISDICTION.—By the provisions of section 3197, Revised Statutes, this lien is to be enforced by suit before a *justice of the peace* of the ward, district or township in which the claimant resides, in the manner provided by said section; and if the judgment is for the plaintiff the justice is required to order that the property upon which the lien shall have been found to exist be sold to satisfy it. But the lien as a certain and complete right cannot exist before the indebtedness is established and by the judgment the lien is, for the first time, fixed and established. And a judgment declaring the indebtedness, and establishing the lien could be rendered only by a justice of the peace of the ward, district or township in which the plaintiff resided.

3. JURISDICTION—RULE AS TO RIGHTS AND REMEDIES—WHEN REMEDY IS EXCLUSIVE—CASE ADJUDGED.—Where a statute creates a right that did not exist before, and provides a remedy for the enforcement of it, that remedy must be pursued, unless the remedy given by the statute is *not adequate*, and not merely when it is uncertain, incomplete or difficult. *Held*, that in this case a complete

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and adequate remedy was provided by the statute for the enforcement of the lien and that remedy was exclusive; and the circuit court had no jurisdiction of it as a court of equity or otherwise. *Held, further*, that had the plaintiff obtained in the justice's court a judgment establishing his lien, the circuit court, as a court of equity, would have had jurisdiction of a suit brought by plaintiff to settle the conflict between his claim on the property, based on the lien thus established, and the claims of the mortgagees founded upon their mortgages, and the court having jurisdiction for that purpose, would have had power to have enforced the plaintiff's lien in the manner deemed just and right by it.

APPEAL from Jackson Circuit Court, HON. F. M. BLACK, Judge.

Reversed and petition dismissed.

Statement of case by the court.

The plaintiff kept a hotel in Kansas City.

The defendant, Acheson, boarded there with his family under a special contract with the plaintiff from March 1, 1883, to November 15, 1883, at which last date the defendant owed on account the sum of $368.75.

The contract was not made for any definite time, but it contemplated a long period of time and was for a certain sum per month, fixed with reference to the contemplated period of time.

The defendants, William Stevens and Henry Sleek, had each a mortgage on the effects of Acheson which were in the hotel on March 1, 1883, and also at the time of the execution of the mortgages. Acheson left the hotel on November 15, 1883, leaving his effects therein. The mortgagees made claim to said effects under their mortgages to the plaintiff.

The plaintiff denied the claims thus made, and brought this action setting up the foregoing facts, claiming a lien upon the goods mentioned for the unpaid balance paramount to the mortgages, praying for a decree establishing the relative priority of the mortgages, and for an injunction restraining the mortgagees from

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attempting to take possession under either of said mortgages, and for the appointment of a receiver *pendente lite* and other proper relief.

Upon a trial the court rendred a decree establishing the plaintiff's lien for the amunt of the balance claimed by him as paramount to both mortgages and ordering its enforcement against the property. The case is here on appeal by the defendants, mortgagees, only.

BOTSFORD & WILLAMS, for appellant, STEVENS.

I. The statute limits the lien to charges for boarding *actually due*, and does not include charges for board to become due for board and lodging to be furnished in the future. *Sect. 3198, Rev. Stat.* This lien is created only by statute. It did not exist at common law. *Hursh v. Byers*, 29 Mo. 469; *Shafer v. Guest*, 6 Robt. (N. Y.) 264; s. c., 35 How. Pr. (N. Y.) 184.

II. The rights of the mortgagee became vested on the acknowledgment, delivery and record of his mortgage, and cannot be divested or impaired by charges on the property covered by the mortgage, created after such execution and record. *Sergeant v. Usher*, 53 New Hamp. 287. The record of the mortgage operated to give notice of the rights of the mortgagee thereunder; and was the equivalent of an actual and continued change of possession; and plaintiff was bound by it the same as if he had actual notice thereof. Sect. 2503, Rev. Stat., *State ex rel., etc., v. Cooper*, 79 Mo. 464; *Berson v. Nunan*, 63 California, 550. Appellant is not bound by charges on the property created thereafter by the voluntary action of plaintiff, without notice to appellant of any claim on the property for future charges. *Brickin v. Croissiant*, 3 Phila. (Pa.) 219.

III. The court below had no jurisdiction of said suit. The statute granting the lien to plaintiff as a boarding house keeper (sect. 3198, Rev. Stat.) specifically

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provides that it shall be enforced before a justice of the peace of the ward, district or township in which the claimant resides. The lien being purely a statutory lien, and the statute creating it providing for a specific remedy before a particular *forum;* that remedy must be pursued in the tribunal created to enforce the right; and no other court has original jurisdiction of the subject matter. The statutory remedy is exclusive. *Moore v. White*, 45 Mo. 206; *Hall v. Hinkley*, 32 Wis. 362; *State v. Bittinger*, 55 Mo. 596.

PRATT, BRUMBACK & FERRY, for the respondent.

I. As against defendant, Acheson, plaintiff has a lien for his unpaid balance. Sect. 3198, Rev. Stat. His lien takes precedence of appellant's for the whole amount of his balance, because it was for services rendered under one entire contract made before the execution of the mortgage, and of which contract appellant is chargeable with notice. *Milner v. Norris*, 13 Minn. 455; *Hahn's Appeal*, 39 Pa. St. 409; *Douglass v. Zinc Co.*, 56 Mo. 388; *Dubois v. Wilson*, 21 Mo. 213; *Ches. Prov. Int. v. Stone*, 56 N. H. 365; *Soule v. Dawes*, 14 Cal. 247; *Batchelder v. Rand*, 117 Mass. 176. The lien is a statutory one, not requiring a special agreement to create it, and as such, is paramount to the lien of a prior recorded mortgage for the whole amount due for such services, whether rendered before or after the execution and record of the mortgage. *Case v. Allen*, 21 Kansas, 217; *Scott v. Delahart*, 5 Lansing (N. Y.) 372.

II. The suit was brought in the right court. The statutory remedy was not exclusive, because not adequate. *Johnston v. Louisville*, 11 Bush (Ky.) 527; *Trust v. Person*, 3 Abb. Pract. 85; *Ryan v. Gallatin Co.*, 14 Ill. 78; *Church v. Robertson*, 71 Mo. 327; *Butler v. Lawson*, 72 Mo. 245; *Bridge Co. v. Hayes*, 5 Cushing (Mass.) 460. Appellant cannot complain of the jurisdiction of the court to decree a sale of the property because such decree is not directed against him, and he

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is not injured thereby. *Papin v. Massey*, 27 Mo. 445; *Wall v. Nay*, 30 Mo. 494; *Johnson v. Armdall*, 34 Mo. 338; *Ames v. Gilmore*, 59 Mo. 537; *Smith v. Railroad*, 53 Mo. 338. If the judgment of the court is correct in establishing plaintiff's lien as *paramount*, then he has the right to enforce it in full, and appellant's only claim is to have the *surplus* turned over to him, and this is secured to him by the decree. If the court was wrong in enforcing this lien against Acheson's property in this proceeding, Acheson, and only Acheson can complain, and he does not appeal.

HALL, J.—Did the circuit court have jurisdiction of this cause?

Section 3198, Revised Statutes, is as follows: "Hotel, inn and boarding house keepers shall have a lien upon the baggage and other valuables of their guests or boarders brought into such hotel, inn or boarding house by such guests or boarders, and upon the wages of such guests or boarders, for their proper charges, due from such guests or boarders for their accommodation, boarding and lodging, and such extras as are furnished at their request."

The lien in this case did not exist at common law; it was created by said statute. This is conceded. It is true, because at common law an inn-keeper had a lien upon the goods of guests only, and not upon the goods of persons boarding with such inn-keepers under a special contract. *Hursh v. Byers*, 29 Mo. 469.

By section 3199, it is provided that "the lien provided for in the preceding section shall be enforced as provided in section 3197." The last named section provides that the lien shall be enforced by suit before a justice of the peace of the ward, district or township in which the claimant resides, in the manner provided by said section. The claimant must file with the justice a statement setting forth his account. And it is provided by said section that "when the defendant shall have

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been summoned or notified as aforesaid, the cause shall on the day fixed for trial be tried as an ordinary case in a justice's court. If the judgment be for the plaintiff the justice shall order the property upon which the lien shall have been found to exist to be sold to satisfy the same."

The plaintiff's *right* to the lien in this case existed from the time he furnished the boarding, lodging, etc. to the defendant Acheson, and in that sense the lien may be said to have existed from that time. But in fact the lien depends upon the existence of an indebtedness due from the defendant, Acheson, to the plaintiff for said boarding, lodging, etc. Unless such indebtedness exists the lien does not exist. It is necessary to establish such indebtedness in order to establish the lien. The lien as an inchoate and uncertain right does exist before the establishment of the indebtedness, but the lien as a certain and complete right cannot exist before the indebtedness is established. Hence it is, that the statute provides that the person claiming the lien must file his account, and that if the judgment be for such person, the justice shall order the property on which the lien shall have been found to exist to be sold to satisfy the same. Before the judgment thus rendered the lien cannot be said to have had an actual existence. By such judgment the lien is for the first time fixed and established.

A judgment declaring the indebtedness and establishing the lien could be rendered only by a justice of the peace of the ward, district or township in which the plaintiff resided.

The rule is, where the statute creates a right that did not exist before and provides a remedy for the enforcement of it, that remedy must be pursued. *Moore v. White*, 45 Mo. 206; *State v. Bittinger*, 55 Mo. 596; *Lindell's Adm'r v. Railroad*, 36 Mo. 543; *Stafford v. Ingersoll*, 3 Hill 41. To the rule there may be this exception, that, if the remedy given by the statute be

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not adequate, the remedy thus given is not exclusive. *Johnson v. Louisville*, 11 Ky. 533.

The principle upon which this rule is based has been thus applied. It has been laid down that courts of equity "have no power to enforce this statutory lien (a mechanic's lien), unless expressly conferred by law or unless, perhaps, there exists some impediment or difficulty which would render the remedy given by the statute unavailable." Phillips on Mechanic's Lien, sect. 2. And it has been said "whenever a legal rightis wholly created by statute and a legal remedy for its violation is also given by the statute, a court of equity has no authority to interfere with its reliefs, even though the statutory remedy is difficult, uncertain and incomplete." 1 Pomeroy's Eq. Jur., sect. 281.

In this case the lien was purely the creature of the statute. A complete and adequate remedy was provided by the statute for its enforcement, and that remedy was exclusive. The circuit court had no jurisdiction of this case as a court of equity or otherwise.

In certain cases a court of equity has jurisdiction, where there is a conflict of claims upon the property by reason of various liens, in order to determine the rights of the respective claimants, and in such cases the court having jurisdiction for that purpose would retain jurisdiction and order the enforcement of the liens in accordance with the adjudged priority of them, and would not turn the parties out of court to pursue their remedies at law. The court of equity having jurisdiction of a part of the case, would have the jurisdiction and power to do complete justice between all the parties. *Paris v. Haley*, 61 Mo. 453; *Cathcart v. Robinson*, 5 Pet. 263. But this principle does not confer jurisdiction of this case upon the circuit court, because the justice of the peace, who alone had jurisdiction so to do, had not established the lien, and until the lien had been thus established no court had the power to enforce it. The principle invoked would, in the proper case, authorize

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a court of equity to enforce a legal statutory lien already established, but it would not authorize such court to establish it. Had the plaintiff obtained in the justice's court a judgment establishing his lien, the circuit court as a court of equity would have had jurisdiction of a suit brought by the plaintiff to settle the conflict between his claim on the property, based on the lien thus established, and the claims of the mortgagees founded upon their mortgages, and the court having jurisdiction for that purpose would have had power to have enforced the plaintiff's lien in the manner deemed just and right by it.

Our opinion on this question and our remarks touching it are to be understood as applying to only such a case as this, where the court having jurisdiction to adjudge the lien and the court of equity are entirely distinct and separate, and not to a case where the court possessing the jurisdiction named has an equity side to it.

The circuit court had no jurisdiction of this case, and we do not, for that reason, determine the other question argued in this case.

The judgment is reversed and the petition dismissed. All concur.

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SELMA WATSON, Appellant, v. CHARLES E. WALTHER, Respondent.

St. Louis Court of Appeals, November 9, 1886.

1. EVIDENCE—RES JUDICATA.—In an action to recover the amount of a note and the expense incurred in foreclosing a mortgage securing it, on the ground that the note had been paid prior to the sale of it by the defendant to the plaintiff, it is not error to exclude evidence tending to show that in a former suit, to which the defendant was not a party, and wherein he had no opportunity to defend, the court had adjudged that the note had been paid.

2. —— PROMISSORY NOTES—PAYMENT.—It appearing that the only parties interested in a note did not intend its transfer to operate as a payment thereof, and that the rights of third persons were not thereby affected, such transfer will not be held to have been a payment.

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Affirmed.

KLEIN & FISSE, for the appellant: The sale and delivery, before maturity, of notes secured by a deed of trust in the nature of a mortgage, carries with it an assignment of the real estate security, which, in equity, is a mere incident of the debt secured. *Logan v. Smith*, 62 Mo. 455; *Goodfellow v. Stillwell*, 73 Mo. 17; *Jœrdens v. Schrimpf*, 77 Mo. 383, p. 385; *Lee v. Clark* [Sp. Ct. Mo.] 1 S. W. Rep. 142. And the same rule applies, even though the notes are sold and delivered after maturity; the purchaser takes the security of the deed of trust as an incident to the notes. *Boatmen's Saving Bank v. Grewe*, 84 Mo. 477; Southern Law Rev. [N. S.] vol. 8, p. 1; 1 Jones on Mortgages [3 Ed.] sect. 841; *Christian v. Newberry*, 61 Mo. 446, p. 451. The mortgage being only a security for the debt, when the debt is

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paid the security is extinguished, and the title reinvests in the grantor. *McNair v. Picotte*, 33 Mo. 57; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124. The note having been discharged before its transfer, there was a failure of consideration, and the appellant is entitled to recover back the consideration paid, as well as the reasonable expense incurred by him in making the sale under the deed of trust and in defending the ejectment suit. *Kingsley v. Fitts*, 55 Vt. 293; *Snyder v. Reno*, 38 Iowa, 329, 335.

SMITH P. GALT, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

The petition alleges in substance, that in November, 1880, the plaintiff bought from the defendant a promissory note executed by Mathias Schulter in favor of A. H. Beckemeyer for one thousand dollars, dated August 1, 1872, and payable twelve months after date, with interest at eight per cent. per annum, and that the note was secured by a deed of trust, which also passed to the plaintiff. That the parties dealt with each other in the understanding and belief that the note was an evidence of subsisting indebtedness, and undischarged, and that the deed of trust upon lot twenty-one in block nine, of North Stoddard addition to the city of St. Louis secured its payment. That it afterwards transpired that the note had been previously paid and discharged, so that the plaintiff got nothing for the sum of five hundred dollars which he had paid to the defendant in its purchase. That the plaintiff had caused a sale in foreclosure to be made under the deed of trust, and had purchased the property himself and gone into possession, but was subsequently ousted thereof by a judgment in ejectment at the suit of James A. Smith. The plaintiff prays judgment for the amount of the purchase money paid by him to the defendant, and that he be reimbursed of expenses incurred in foreclosing the deed of trust. At the

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close of the trial, the court instructed the jury, that the plaintiff was not entitled to recover.

The facts of the case, stated in their chronological order, are as follows: The note was executed and delivered by Schulter to Beckemeyer, as already stated, on August 1, 1872. A deed of trust to secure it was executed and delivered at the same time, but this deed, instead of conveying lot twenty-one, as was intended by the parties, described the property as lot twenty-two, which was a lot that Schulter had previously conveyed away. At this time, Schulter and William Schroeder were partners in business, and so continued to be until January 19, 1873, when their connection was determined, and Schroeder undertook to settle up the partnership affairs. At some time after the maturity of the Schulter note, Schroeder paid Beckemeyer its face value and took it up with Beckemeyer's endorsement, "without recourse." On May 19, 1874, a judgment was rendered in the circuit court against Schulter in favor of Forsting, administrator, for $527.62. At some time during the year 1876, there was a settlement of the partnership matters between Schulter and Schroeder. Prior to this settlement, Schulter requested Schroeder to deliver the Schulter-Beckemeyer note to Walther, the present defendant, to whom Schulter was largely indebted. Schroeder refused to do this until after a settlement with Schulter. In the settlement, the note was included among the credits in favor of Schroeder. Again Schulter requested that the note be handed over to Walther, by way of collateral security on his existing indebtedness. Schroeder testifies that he thereupon either gave the note to Walther, or handed it to Schulter for delivery to Walther. At all events, Walther then got the note and the deed of trust, as they stood at that time. On or about April 19, 1877, the sheriff advertised lot twenty-one for sale under the Forsting judgment against Schulter, and then it was first discovered that the wrong lot had been described in the deed of trust of 1872. On the same day a new deed of

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trust was executed and delivered by Schulter and wife, for the purposes set forth in the former deed, and reciting that this deed was intended for a correction of the mistake contained in the first deed. It was expressed to be between the same parties, and conveyed lot twenty-one as the first conveyance should have done. On May 12, 1877, the sheriff sold lot twenty-one under the Forsting judgment to Thomas Grace and delivered a deed accordingly. On November 26, 1879, a judgment for back taxes due upon lot twenty-one was rendered against the heirs of Thomas Grace, who had departed this life. On July 24, 1880, the same lot was sold under the tax judgment to James A. Smith, to whom a deed was executed in due form by the proper officer. In November, 1880, the present defendant sold to the plaintiff the Schulter note for five hundred dollars cash, and undertook to manage the foreclosing of the deed of trust. On December 27, 1880, there was a sale under the corrected deed of trust, and the plaintiff became the purchaser of the property. He occupied it for nearly two years, and then James A. Smith sued him in ejectment and obtained judgment for possession of the lot on March 16, 1882. Under this judgment, the plaintiff was afterwards ousted by execution in the hands of the sheriff. At the time of the trade between the plaintiff and the defendant, it was well understood by both parties that the plaintiff's chief object was to secure, through a foreclosure of the deed of trust, the ownership of lot twenty-one. The plaintiff offered to prove by oral testimony that the ejectment suit was determined against him by reason of the fact that the note had been paid and discharged before the foreclosure of the deed of trust, whereby the present plaintiff's title under that instrument was defeated. He also offered to introduce, for the same purpose, the instructions given in the same case. All this testimony was excluded and the plaintiff excepted. There was no error in this. The present defendant was not a party to the ejectment suit, nor had he any opportunity of defending

against it. He was not in any way bound by either its rulings or its final result.

The only ground possible for a recovery by the plaintiff in this case, would lie in the fact that the note was paid and discharged, as he claims, in the settlement between Schulter and Schroeder. This fact must be established by satisfactory evidence in the present case, and can get no aid from a different proceeding to which the defendant was not a party. We find no such evidence from this record. All the acts and declarations of the partners before, during, and after the settlement, show that such a payment or discharge was never contemplated by either of them. It was the intention at all times that the note should be passed over to Walther under the blank endorsement of Beckemeyer, which was effectual to carry the title. Schroeder held the note as his own, and Schulter in allowing a credit for it to Schroeder, became a paymaster merely for Walther in the latter's acquisition of the paper, which was directed by Schulter and acquiesced in by Schroeder. The rights of no third party were affected by the transaction; and if it is possible in law for the only persons interested to do as they will with their own, the note was kept alive in that transaction, and so remained in the hands of the transferee. For aught that appears in this record, the note was open and enforceable in the hands of the plaintiff, so long as it was not barred by the statute of limitations. If the maker is or has been insolvent, nothing appearing in the record can hold the defendant responsible on that account.

It follows that the plaintiff has shown no right of recovery, and, with the concurrence of the other judges, the judgment of the circuit court will be affirmed.

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CHARLES SIEBERT, Defendant in Error, v. SUPREME COUNCIL OF THE ORDER OF CHOSEN FRIENDS, Plaintiff in Errror.

St. Louis Court of Appeals, November 9, 1886.

1. INSURANCE—FORFEITURE—CONDITIONS OF—HOW CONSTRUED.—Conditions of forfeiture in insurance contracts are strictly construed.

2. ——— BENEVOLENT INSURANCE SOCIETIES—BURDEN OF PROOF. Under the law of a benovolent insurance association, which provides that the failure of a member to pay an assessment, after he shall have been notified in a stated manner, shall work a forfeiture of benefits, the association claiming the forfeiture must show that the member was so notified.

3. ——— EVIDENCE—INFERENCES.—That the member of such an association, in such a case, knew of the assessment is a fact from which the jury may, but are not bound to, infer that he was properly notified.

4. ——— BURDEN OF PROOF.—The plaintiff's right of recovery being dependent upon the fact that the deceased was a member in good standing at the time of his death, and such fact being denied by answer, the burden of proof to establish it is on the plaintiff.

5. PRACTICE——IRRELEVANT TESTIMONY.——The admission of irrelevant testimony, not submitted to the jury by instructions and not otherwise prejudicial to the appellant, is not ground for reversing a judgment.

ERROR to the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

LOUIS A. STEBER, for the plaintiff in error: The court on the case as a whole should have sustained the defendant's motion for judgment *non obstante veredicto*. *Powell v. Railroad*, 76 Mo. 85; *Borgraefe v. Knights*, 22 Mo. App. 127; *Slayback v. Girkhardt*, 1 Mo. App. 333; *Maser v. Ins. Co.*, 2 Mo. App. 408; *Eaton v. Knights*, 22 Cent. L. J. 560; *St. Patrick v. McVey*,

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92 Pa. St. 510. The deceased had knowlege of the assessment and when it was due and payable. *Hollister v. Insurance Co.*, 118 Mass. 479; *Speck v. Riggin*, 40 Mo. 405; *Maupin v. Emmons*, 47 Mo. 304; *Stule v. Insurance Co.*, 3 Mo. App. 207. That notice of the asssessment was not mailed or delivered on its date, ample time for payment being had, is immaterial. *Ancient Order v. Moore*, 9 Ins. L. J. 539. Notice means the means of knowledge of which a person wilfully neglects or refuses to take anvantage. *Lee v. Turner*, 15 Mo. App. 213; *Hill v. Tissier*, 15 Mo. App. 300. Punctual payment is the essence of the contract. The orders could not exist and do business without it. *Klein v. Ins. Co.*, 104 U. S. [14 Otto] 88; *Thompson v. Ins. Co.*, 104 U. S. [14 Otto] 258; *McMurray v. Knights*, 13 Ins. L. J. 569 [472.]

LEO RASSIEUR, DEXTER TIFFANY, and B. SCHNURMACHER, for the defendant in error: The answer denied the vital allegation of the petition, to-wit, that Gertrude Siebert, at the time of her death, was a member in good standing. It rested on the plaintiff to show this. The burden of proof was, therefore, upon him. *Porter v. Jones*, 52 Mo. 399. The deceased was a member in good standing once and a state of facts once shown to exist will be presumed to continue until the contrary be shown. *Cargile v. Wood*, 63 Mo. 501; *Ansyln v. Franke*, 11 Mo. App. 598; *Supreme Lodge v. Johnson*, 78 Ind. 110. It is for the jury, under all the circumstances, to say whether the notice was in point of fact sent, or whether the secretary might not have been honestly mistaken in supposing that he had sent it. *Borgraefe v. Supreme Lodge*, 22 Mo. App. 127. Courts regard forfeitures with great disfavor, and the proof to establish them must be clear and satisfactory. *Borgraefe v. Supreme Lodge*, 22 Mo. App. 127; *Froehlich v. Ins. Co.*, 47 Mo. 406; *Sims v. Ins. Co.*, 47 Mo. 14; Hirschl on Fraternities, 34; *Supreme Lodge v. Abbott*, 82 Ind. 1.

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LEWIS, P. J., delivered the opinion of the court.

The defendant is an incorporated benevolent association which issues benefit certificates to its members for the payment of a fixed sum, upon the death of a member, to such person as shall be designated in the certificate. Gertrude Siebert (now deceased) was the wife of the plaintiff and a member of the association, holding a certificate for the payment of two thousand dollars to her husband at her death. The plaintiff had a verdict and judgment for that sum with interest, upon which the defendant prosecutes this writ of error.

The supreme council acts upon its members through the subordinate councils to which they respectively belong. Gertrude Siebert belonged to Pearl Council number fifteen, located in the city of St. Louis. Her application for membership contained the following:

"If admitted, I agree to make punctual payment of all dues, and assessments for which I may become liable, and to conform in all respects to the laws, rules, and usages of the order, now in force, or which may be adopted by the same. * * * I do hereby further consent and agree that * * * my suspension * * * from * * * the order shall forfeit my rights to all benefits and privileges therein; nor shall it be lawful in case of my death during such suspension, for any of my heirs, devisees, or legatees to receive any benefit or endowment whatever from the supreme or any grand or subordinate council of Chosen Friends."

The membership and benefit certificate provided for the payment of the benefit "in the manner and subject to the conditions set forth in the laws governing said relief fund and in the application for membership," and that the certificate should be in force and binding "so long as said member shall comply with the requirements of the constitution, laws, and regulations adopted for the government of the order; otherwise to be null and

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void." Among the requirements of the constitution, laws, and regulations referred to are the following:

"Sec. 5. When an assessment is made it shall be the duty of the secretary to at once notify every member liable to the assessment. The assessment notice shall be furnished by the supreme council and shall bear the seal of the subordinate council, with the signature of the secretary attached; each member shall pay the amount due, to the secretary, within thirty days from the date of such notice, and any member failing to pay such assessments within thirty days shall forfeit all rights and claims to benefits under the relief fund law, and shall be reported suspended from beneficiary membership, by the secretary, in his report to the supreme treasurer, and to the council at its next regular meeting thereafter, and shall stand so suspended until all arrearages and fines shall have been paid to the secretary, and all other laws governing reinstatements have been fully complied with. Any council failing to report such delinquent, shall pay, as a fine, out of its general fund, an amount equal to the amount of all assessments which the member would have paid had he or she remained in good standing. The notice provided for by section 1, article 8, of the subordinate council constitution, is a legal notice for the purposes of this section, and shall be so regarded."

And section 1, article 8, concerning notices, above referred to, reads as follows:

"Sec. 1. The secretary shall make out and deliver to each beneficiary member in good standing, either in person, to some person authorized by the member to receive notice, or by depositing the same in the post office directed to the member's last known address, a written or printed notice of each assessment on account of the relief fund issued by authority of the supreme council, and such a notice so delivered shall be deemed and held to be legal notice of such assessment. The secretary, in

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making these notices, is required to use the official notice blank furnished by the supreme council, but the use of any other form or blank shall not invalidate the notice to the member, but only render the secretary subject to discipline."

The defence is, that Mrs. Siebert, although duly notified, failed to pay assessment number 72, for $1.20, which was declared on April 15, 1885, and payable on or before May 15, 1885. She died on May 16, 1885. It is not pretended that this assessment was paid within the time required, or at any time before Mrs. Siebert's death. The controversy turns upon the question whether she was so notified or informed of the assessment as to incur a forfeiture by its non-payment. The plaintiff here holds that the notice given, in order to have such an effect, must be shown to have substantially followed, in its form and manner of service, the rules prescribed in the constitutional regulations above copied. The defendant insists that it will suffice if it appear that Mrs. Siebert had knowledge of the assessment, derived from any source, or that she had such a knowledge as should have put her upon inquiry about it. The court instructed in accordance with the plaintiff's view, and we think this was the correct ruling.

There are many cases where a person must, at his peril, act upon the knowledge of a particular fact, however derived, or upon such information as should reasonably put him upon inquiry. But wherever the special law of the notice prescribes the form and manner in which it is to be given, especially when a forfeiture may result, the party to be affected will, as a general rule, not be bound by a notice given in any other form or manner. Thus, when a man's rights are to be adjudicated in a court of justice, he is entitled to just the form, manner, and time of notice that are directed by the statute; otherwise he will not be bound by the proceedings, although bodily present in the court room, seeing and hearing all that may be done. The endorser of a

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promissory note may have a personal knowledge of the maker's intention not to pay, or of his failure to pay, at maturity. Yet the holder can not subject him to any liability, without a notice of the dishonor, given in the form, time, and manner established by commercial law and usage. Mrs. Siebert might have heard a rumor, or have been informed by a friend, that assessment number 72 had been declared, and must be paid by a certain time. But she had a right to disbelieve the rumor, or the friend, until a knowledge of the fact was brought home to her in the way for which she had stipulated in her contract with the association. That contract was visible in the printed laws of the association, and in her acceptance of them in her application for membership.

The only attempt to prove notice was in the testimony of two witnesses. Mrs. Thomas, the secretary of Pearl Council, No. 15, testified, in effect, that she received from the officers of the supreme council a notice of assessment number 72, together with a number of printed notices for delivery to the members of her subordinate council. Blanks were left for the names, and one of these blanks she filled with the name of Gertrude Siebert. She "gave it to her, not personally, but sent it to her;" could not swear of her own knowledge that Mrs. Siebert received it. "Q. You remember how this notice number 72 was served upon Mrs. Siebert? A. Not on her, I do not know."

Mrs. Michaels, a member of Pearl Council, testified that, on the day of the last council meeting before May 15, Mrs. Siebert called on her with a request that she would take the money for Mrs. Siebert's assessment and pay it at the meeting. The witness declined to do this, saying that she did not intend to be there. Mrs. Siebert then said that she would herself pay it the next day.

Upon this testimony it cannot be positively assumed

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that Mrs. Siebert received the notice to which she was entitled by the law of the association. It does not appear that it was delivered to her, "either in person, to some person authorized by the member to receive notice, or by depositing the same in the post office directed to the member's last known address." Some license is given near the close of the section as to the form or blank to be used, but none as to the manner of service. Mrs. Siebert, before seeing Mrs. Michaels, may have had some information of an assessment, but afterwards declined to act without a proper notification. A jury might infer that Mrs. Siebert did, or that she did not, receive the proper notice, without doing violence to the proofs. It is incidental to our jury system, that jurors may adopt the most highly improbable of several hypotheses properly submitted to them, and yet their verdict must be judicially permitted to stand, however unsatisfactory to other minds. It is manifest from the record in this case, that the jury were not satisfied that Mrs. Siebert had received a proper notice, in accordance with the laws of the association. The testimony was substantially competent to create such a doubt, and we are not authorized to reverse its practical effect. Our attention is directed to a provision in section 3, whereby the council "shall not excuse members, or pay or cause to be paid to them any benefits which they may have forfeited by non-payment, because of a failure on the part of the secretary to give them written or other notice." It may be a question whether this provision would be judicially sustained, in any case, as a *reasonable* by-law of a private corporation. But, at all events, it has no application to the present case. It has no reference to death benefits, but only to sick benefits, which are treated of in a preceding section. It contemplates only payments *to members;* and these cannot include death benefits, which are paid, not to members, as such, but to the person named in the certificate, who may not be a member.

Complaint is made that the court erroneously re-

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fused to allow to the defendant the opening and conclusion at the trial. The vital issue raised by the pleadings was, whether Gertrude Siebert was, at the time of her death, a member of the association in good standing. The affirmative of this issue belonged to the plaintiff, and the court's ruling was correct.

The defendant assigns for error the admission of evidence tending to prove that Mrs. Siebert's assessment was paid after her death by the plaintiff. There is nothing in the objection. The matter was first introduced by the defendant's counsel, who elicited from the secretary a statement that she refused to receive from the plaintiff a payment on Mrs. Siebert's account, after the death. The plaintiff testified in rebuttal that the secretary actually received and accepted the payment. The court stated that this fact could be of no avail to the plaintiff, unless it was followed up by evidence that the supreme council had afterwards ratified the payment by a receipt of the money. No such evidence was offered. The instructions given were wholly inconsistent with any supposition of the possibility of a valid payment of the assessment after the death of Mrs. Siebert.

Upon the whole record, we find that the case was fairly submitted to the jury. We cannot, therefore, disturb the verdict, and the judgment must be affirmed. All the judges concur.

LENA SHERER, Respondent, v. AUGUST RISCHERT, Appellant.

St. Louis Court of Appeals, November 9, 1886.

1. APPELLATE PROCEDURE—WEIGHT OF EVIDENCE.—In actions at law, appellate courts will not weigh the evidence where there is substantial evidence to support the verdict.

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2. ——— INSTRUCTIONS.—An instruction which is correct as applied to the merits of the controversy, will not be declared erroneous because it is inartificially drawn.

APPEAL to the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

B. SCHURMACHER, for the appellant.

JOSEPH JECKO, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff sues for damages suffered by the bites of a vicious dog owned by the defendant. On the defendant's appeal from the judgment of a justice of the peace, there was a verdict for the plaintiff in the circuit court for two hundred dollars.

The evidence shows that the plaintiff, a girl of thirteen years, was playing with her companions on Geyer avenue, and, while on the public sidewalk, was seriously bitten in both legs by the defendant's dog. There was testimony that the dog had previously bitten a police officer twice, at different times; once while in the same room with the defendant, who thereupon seized the animal and drove it out. Another policeman testified that the dog had also attacked him, when he drove it away with his club. The witness had told the defendant about this, and had also told him about the dog's trying to bite a newspaper carrier. Several witnesses for the defence testified that they had known and frequently seen the animal for a long time, and had never known of its attempting to harm any one. The defendant attested the peaceable character of his dog, which was generally permitted to run at large, but was kept within the yard at night time, and said that he had never been before informed of any injury done or attempted by the animal.

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The court gave the following instruction for the plaintiff:

"If the jury believe, from the evidence, that the defendant, August Rischert, was the owner and possessor of a fierce and dangerous dog, and permitted the same to run at large on a public highway in the city of St. Louis, to-wit, Geyer avenue; and that said dog, while so at large, did attack, bite, lacerate, wound, and injure the plaintiff, Lena Sherer, as set forth in plaintiff's petition; and if the jury further believe from the evidence, that said dog, before the time of the injuries inflicted on said Lena, had attacked and bitten other person or persons, and that said defendant, Rischert, had notice or knowledge that said dog was disposed to bite persons before said Lena was so attacked and injured, their verdict should be for plaintiff."

The only errors complained of are the giving of this instruction, and the refusal to set aside the verdict on the ground that it was contrary to the evidence. The instruction may be open to criticism in its reference to the plaintiff's petition, but in this case the fault was harmless.

The verdict was supported by ample testimony, and the judgment is affirmed, with the concurrence of all the judges.

JOSEPH WEHRINGER, Respondent, v. FRED. AHLEMEYER, Appellant. 23 277 178 199

St. Louis Court of Appeals, November 9, 1886.

1. PRACTICE—AMENDMENTS—APPEALS FROM JUSTICES.—It is error to permit the plaintiff to amend his cause of action in the circuit court by filing an account showing a balance of two hundred and fifty dollars, when the justice's transcript shows that the cause was tried

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before him on an account showing a balance of $187.50, and that a judgment was rendered for the plaintiff, from which the defendant appealed.

2. ——— VERDICT AGAINST INSTRUCTIONS.—A verdict for one hundred dollars for the plaintiff should be set aside where the court has instructed the jury to find for the plaintiff in the sum of two hundred dollars, or to find for the defendant.

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Reversed and remanded.

BROADHEAD & HAEUSSLER, for the appellant: The cause of action known as "account stated," is an independent and distinct cause of action. *Cape Girardeau v. Kimmel*, 58 Mo. 83; *Brown v. Kimmel*, 67 Mo. 430; *Ward v. Farrelly*, 9 Mo. App. 370; *Kent v. Highleyman*, 17 Mo. App. 9. The circuit court erred in permitting plaintiff to file the amended statement upon the trial. *Murphy v. Bedford*, 18 Mo. App. 279; *Newman v. Kenton*, 79 Mo. 385.

HENRY BOEMLER, for the respondent: The amendment was properly made. *Vaughn v. Railroad*, 17 Mo. App. 4; *Henson v. Jones*, 20 Mo. 595; *Butts v. Phillips*, 79 Mo. 302; *King v. Railroad*, 79 Mo. 328. The finding of the jury, as to the amount, is conclusive. *Remmler v. Schmit*, 15 Mo. App. 192; *Humphries v. Printing Co.*, 10 Mo. App. 180; *Smith v. Hutchinson*, 83 Mo. 687; *Hamilton v. Berry*, 74 Mo. 176.

LEWIS, P. J., delivered the opinion of the court.

Suit was commenced before a justice of the peace on an open account, as follows:

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"ST. LOUIS, July 31, 1885.

"Fred. Ahlemeyer to Joseph Wehringer, Dr.

For services rendered as hired hand from March 3, 1882, to July 4, 1885, at $15 per month......	$630 00
Credit by cash..................................	442 50
	$187 50

The plaintiff had judgment for $72.50, from which the defendant appealed to the circuit court, where the plaintiff got a verdict for one hundred dollars. The following entries appear in the bill of exceptions:

"Be it remembered, that on the trial of above cause following proceedings were had, to-wit: Plaintiff stated that he did not claim to recover on the account filed with justice, claiming a balance of $187.50, but withdrew said claim, and asked leave to file the following as an amended account, claiming a balance due as two hundred and fifty dollars, to-wit:

"Fred. Ahlemeyer to Joseph Wehringer, Dr.

1883.

March to July, 1885. To 29 months as a common laborer, at $15 per month, amounting to.......	$435 00
Credit by cash.......	185 00
	$250 00

"And that on this account he claimed a balance due of two hundred dollars, as agreed upon at settlement between parties. * * *

"It appeared this amended account was filed with the justice of the peace on September 2, 1885, and was sent up by the justice to the circuit court, with the papers in the case, but no mention of it, or of its filing, was made in the transcript of the justice of the peace."

The second of these entries contradicts the first,

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which, if it stood alone, would be conclusive that the amended account was first introduced in the circuit court. The trial before the justice took place on September 2, and his judgment was rendered on September 5, 1885. The paper was thus before him three days while the cause was pending, but nothing indicates that it was considered by the justice, or that it had anything to do with his judgment. The omission from the transcript might not be conclusive against a showing by parol that the amended account was treated by the justice as the foundation of the suit, and that his judgment had reference to that alone. But, in the absence of everything which might indicate these facts, we are bound to consider the account first filed as the only matter before the justice, and carried up by the appeal. That account claimed a balance due of $187.50. The amended demand was for two hundred and fifty dollars. Such an increase amounted, in effect, to a change of the demand, which thus was not "the same cause of action, and no other, that was tried before the justice," as is required by Revised Statutes, section 3058. To this was added a change by parol to an action on an account stated, when the petition gave notice only of a demand on open account.

The plaintiff testified that he worked for the defendant, as a gardener, from March, 1883, until July, 1885. That his wages came to four hundred and thirty-five dollars, and he received two hundred and forty-three dollars in all. That in August, 1885, the parties compared their accounts and had a settlement, when it was agreed between them that the defendant owed him a balance of two hundred dollars, after paying him eight dollars at that time, and that this balance yet remained unpaid. The defendant testified to the time of service and wages agreed upon, with some slight variations from the plaintiff's account. He also testified that at the time of the settlement mentioned, his account showed that the plaintiff's services since their last previous settlement, after deducting lost time, amounted to one hundred and eighty-

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seven dollars, and he then paid the plaintiff eight dollars, which, added to sums previously paid, made $188.35. That the plaintiff accepted the eight dollars as a payment of all that was due him, and declared himself well satisfied.

The court gave for the plaintiff the following instruction:

"1. The court instructs the jury that if they find, from the evidence, that plaintiff and defendant on the third day of August, 1885, had a settlement for work and labor done by plaintiff for the defendant, then the plaintiff is entitled to recover from the defendant such amount as the defendant then owed plaintiff, as shown by that settlement, less the amount the plaintiff has received on such settlement."

This instruction narrowed down the issue of fact before the jury to the single inquiry, whether the settlement ascertained a balance due from the defendant of two hundred dollars, as testified by the plaintiff, or of nothing whatever, after the payment of eight dollars, as sworn to by the defendant. It is manifest, from the verdict of one hundred dollars in favor of the plaintiff, that the jury wholly ignored the instruction, and set up a ruling of law for themselves. Whether there was, or was not, error in the previous proceedings, the court ought to have set aside this verdict and sustained the motion for a new trial. It could only be in a case where the judgment was most unquestionably for the right party, that an appellate court would permit such a verdict to stand.

All the judges concurring, the judgment is reversed and the cause remanded.

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H. A. HAEUSSLER, Appellant, v. LACLEDE BANK, Respondent.

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St. Louis Court of Appeals, November 9, 1886.

1. ATTACHMENT—DAMAGES—PARTIES TO ACTION.—The person who was the owner of real estate at the time it was attached in a suit against another, is the only proper party to a suit to recover damages caused by the attachment, notwithstanding he may have sold the real estate pending the attachment suit.

2. ——— DAMAGES—COSTS—EXPENSES.—Counsel fees and other expenses of litigation can not be recovered as damages, except in cases where they are taxable as costs under the statute, or in cases where the elements of fraud, malice, or oppression appear.

3. ——— PLEADINGS.—In actions to recover as damages the expenses of the attachment suit, the petition must state facts which show that such expenses are taxable as costs, or that the case presents the elements of fraud, malice, or oppression.

APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Affirmed.

CECIL V. SCOTT, for the appellant: A person other than the defendant in a writ of attachment whose property is wrongfully taken thereunder, may maintain an action against the plaintiff in the attachment suit, if he directed or assented to the wrongful levy, to recover the damages sustained. *Buck v. Colbath*, 5 Wall. 334; *Lamon v. Feusier*, 111 U. S. 19; *Perrin v. Claflin*, 11 Mo. 13; *Vose v. Woods*, 34 Hun [N. Y.] 447; *McDaniel v. Gardner*, 34 La. An. 341. Though an attachment is wrongfully levied upon the property of another than the defendant, without malice, and under legal advice, the defendant is entitled to his actual damages; it is only necessary to allege and prove malice when vindictive damages are claimed. Sedgwick on Damages

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[3 Ed.] 476; *McDaniel v. Gardner*, 34 La. An. 341; *Frank v. Chaffee*, 34 La. An. 1203; *Lamon v. Feusier*, 111 U. S. 19; *Buckley v. Knapp*, 48 Mo. 161; *Perkins v. Railroad*, 55 Mo. 213; *Philpot v. Taylor*, 111 Ill. 309; *Dixon v. Faucus*, 30 L. J. N. S. O. B. 137. Expenses necessarily incurred by the plaintiff in resisting such wrongful levy and seizure, may be recovered as damages. *Frank v. Chaffee*, 34 La. An. 1203; *Philpot v. Taylor*, 111 Ill. 309; *McDaniel v. Gardner*, 34 La. An. 341; *Dixon v. Faucus*, 30 L. J. N. S. O. B. 127.

BOYLE, ADAMS & MCKEIGHAN, for the respondent. Expenses of litigation, other than such as are taxable as costs in the suit, can not be recovered of the adverse party, except in cases involving fraud or malice. *Walker v. Borland*, 21 Mo. 289; *The State v. Smith*, 31 Mo. 566; *The State to use v. Allen*, 12 Mo. App. 566; *Roberts v. Mason*, 10 Ohio St. 277; *Barnard v. Poor*, 21 Pick. 382; *McDaniel v. Crabtree*, 21 Ark. 433; *Pacific Ins. Co. v. Conard*, 1 Bald. 138; *Gilson v. Wood*, 20 Ill. 37; *Williams v. Reil*, 20 Ill. 147; *Stephen v. Beach*, 26 Conn. 355.

ROMBAUER, J., delivered the opinion of the court.

Two questions of law are raised by this appeal: 1. Whether there is a defect of parties plaintiff in the petition. 2. Whether the petition states facts sufficient to constitute a cause of action.

A demurrer was interposed to the petition on these two grounds, the demurrer was sustained by the trial court, and the plaintiff refusing to plead further, judgment was entered for the defendant.

The petition in substance states, that the plaintiff was, at the date of the alleged grievance, the owner in fee of certain real estate in the state of Illinois, and that on July 19, 1881, the defendant wrongfully caused an attachment to be levied thereon in a suit against one Keeler, and caused the same to be attached as the prop-

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erty of Keeler, well knowing that the property was that of the plaintiff. That the plaintiff, thereafter, on the ninth of September, 1881, by deed conveyed the property to the St. Louis Carbon Works, covenanting in such deed to defend the grantee from all loss, damage, and costs, by reason of said attachment, levy, and seizure, whether attorney fees, or otherwise. The petition further states that the laws of the state of Illinois provide that any other person than the defendant in the attachment claiming attached property, may interplead therefor; that the St. Louis Carbon Works did interplead for said property, requiring the plaintiff to prosecute said interpleader, which the plaintiff did, incurring, in so doing, a necessary expense of $829.20, exclusive of court costs, and now brings this action for the recovery of the amount thus expended.

The record fails to show on what ground the demurrer was sustained, but if it was properly sustained on either ground, the judgment can not be disturbed.

We are not advised whether such expenses as are herein claimed are taxable costs in an interpleader proceeding under the statute of the state of Illinois, but assume, from the fact that no such claim is advanced in the petition, that they are not. Such being the case, we can not see on what ground this case forms an exception to the general rule that expenses of litigation, other than such as are taxable costs, can not be recovered of the adverse party, in the absence of a contract stipulation governing damages, except in cases involving *fraud*, *malice*, *or oppression*.

Where the wrong is one to the plaintiff's person, the damages are necessarily not determinable by any fixed standard, and are practically determined by the good sense and unbiased judgment of a jury, but where the wrong affects the plaintiff's property, and thus incidentally affects the plaintiff, the damages are determined by a fixed legal standard, and counsel fees ordinarily form no element of such damages. *McDaniel v. Crabtree*, 21

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Ark. 433, 434; *Bernard v. Poor*, 21 Pick. 378, 382; *Roberts v. Mason*, 10 Ohio St, 277, 232. The cases of *Philpot v. Taylor* (75 Ill. 310), and *Frank v. Chaffee* (34 La. An. 1203), on which the plaintiff mainly relies, are no authorities to the contrary. The former was a case of gross fraud, and the language of the court as applicable to such a case, was clearly pertinent; the latter was decided in a state where the civil law is the underlying base of all decisions, and counsel fees, under the Roman law, were awarded to the successful party, where the claim or defence was ungrounded, even in actions of contract. Sedgwick on Damages [6 Ed.] 109.

The rule that in all cases, a person other than the defendant in a writ of attachment, whose property is wrongfully taken thereunder, may maintain an action against the plaintiff in the attachment suit, if he directed the wrongful taking, or assented to it, is unquestionably well established. That, however, is a rule affecting only the right of action and not the measure of damages. The right of action is expressly given by the statute of the state of Illinois, which authorizes such party to interplead.

It is not pretended that by the mere levy of an attachment on the plaintiff's realty, his possession or control of the property was disturbed. The presumption is that the levy was made,as similar levies are made in this state, by indorsement upon the writ, and as such at most a constructive trespass. If the plaintiff has any right to recover, such right must be founded on the wrongful interference with his property, and not on his covenants of indemnity given thereafter to his grantee. Were it otherwise it would be optional with a party to enhance his damages after suit brought by his voluntary action.

But a mere wrongful interference with property, with the exceptions above noted, does not entitle a party to counsel fees incurred in an action defending against

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it. Nor has the plaintiff, by any allegations of his petition, brought himself within the exceptions.

The judgment is affirmed. All the judges concur.

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THOMAS MCALLISTER ET AL., Appellants, v. MARY C. WILLIAMS ET AL., Respondents.

St. Louis Court of Appeals, November 9, 1886.

1. EQUITY — MARSHALING ASSETS — ADMINISTRATION.—The equitable doctrine as to the marshaling of assets for the payment of the debts of decedents has no application in this state since the enactment of the statutes of administration.

2. ——— ANCESTOR AND HEIR—COVENANTS—EVIDENCE—BURDEN OF PROOF.—In a suit against an heir on a covenant of his ancestor, the plaintiff must show not only that the defendant has assets by descent, but that administration on the ancestor's estate was closed prior to the beginning of the suit.

3. ——— EVICTION.—In such an action to recover substantial damages on a covenant against incumbrances, the plaintiff must show that the incumbrance existed at the date of the covenant, and that the eviction complained of was due to such incumbrance.

4. PRACTICE—FAILURE OF PROOF.—A judgment for the defendant will not be disturbed where there is a failure of proof of facts essential to the plaintiff's recovery.

APPEAL from the Scotland County Circuit Court, BEN. E. TURNER, Judge.

Affirmed.

SMOOT & PETTINGILL, for the appellants: It was not necessary to present the claim against the decedent's estate. *Sauer v. Griffith*, 67 Mo. 654. The action is properly brought against the heirs direct, and they are liable to the extent of the assets descended. *Walker v.*

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Deaver, 79 Mo. 664; *Miller v. Bledsoe*, 61 Mo. 96. They are liable *pro rata*. *Metcalf v. Smith*, 40 Mo. 572. And when the breach ocurs after final settlement, a court of equity has jurisdiction to cause the damages to be paid out of personal assets. *Hall v. Martin*, 46 N. H. 337; *Penn v. Lord Baltimore*, 1 Ves. 444; *Dickinson v. Hoomes*, 8 Gratt. [Va.] 410; *Williamson v. Codrington*, 1 Ves. 511.

Higbee & Raley and Elias Scofield, for the respondents: The heir is liable to the extent of lands descended. It is admitted that no lands descended to the deendants, hence they are not liable. Rev. Stat., sect. 3944; *Metcalf v. Larned*, 40 Mo. 572; *Titterington v. Hooker*, 58 Mo. 597, 598; *Sauer v. Griffin*, 67 Mo. 657, 658; *Bates v. Norcross*, 17 Pick. 15, 18; *Thompson v. Brown*, 4 Johns. Ch. 619; Tiedeman on Real Prop., sec. 857, p. 700.

Rombauer, J., delivered the opinion of the court.

The following are the facts of the case as shown by the record before us:

In 1854 Thomas Richardson, the owner of certain lands in Scotland county, laid the same out as Richard, son's addition to the town of Memphis, and made a plat thereof which was duly recorded. A strip of land was marked on said plat as Smith street. He subsequently conveyed the lands to Eugene Williams and the latter conveyed them in 1871 to one Byrne with covenants of seizin, warranty, and against incumbrances. Eugene Williams died in 1872, leaving surviving him his widow, the defendant Mary, and two children, the other two defendants in this case. In 1875, Byrne deeded the greater portion of the lands, including this supposed Smith street, with similar covenants as the above to the plaintiffs.

The strip of land marked Smith street on said plat was inclosed with other portions of the land, and in the exclusive possession of Williams when he conveyed to Byrne. It remained inclosed and in the possession of

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Byrne and the plaintiffs until the year 1884, when the then city, formerly town of Memphis, recovered a judgment of ouster for the same in an action of ejectment instituted against the plaintiffs in 1883.

The plaintiffs thereupon instituted this suit in equity against the defendants as heirs of Eugene Williams, to recover from them damages on account of alleged breaches of covenant in the deed of 1871.

It appeared further that the defendants inherited no lands from Eugene Williams; that upon his death administration was taken out on his estate, and that the administrator at some time had turned over personal assets to the defendant Mary, who had elected to take a child's part, in her own right, and to her as curatrix of her minor children, the other defendants herein, which assets exceed the damages sought to be recovered in this action, and are still held by the defendants.

It also appeared that the county court of Scotland county had reconveyed to Eugene Williams the strip platted as Smith street. Also that at the time of the pendency of the ejectment suit brought by the city of Memphis against the plaintiffs, the defendants were notified of such suit and were requested to defend against it, but it did not clearly appear whether the defendants did defend.

In the present proceeding the defendants pleaded the general issue and the statute of limitations of five years and ten years, and upon the testimony as above detailed, judgment was entered in their favor.

As no error has properly been assigned in this court by the appellants, we might affirm the judgment on that ground alone, but as counsel on both sides have argued the propositions of law arising in the case with some diligence, we prefer to place our judgment on more substantial grounds.

It is evident that on no theory of the case can the plaintiffs recover in this action, without proof that the administration of Eugene Williams' estate has been

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finally closed. There is no such proof in the record before us. The doctrine of equitable assets, and marshaling assets in equity for the payment of debts of decedents, has no application in this state, as it has been superseded by statutes governing the administration of decedents' estates. *Titterington v. Hooker*, 58 Mo. 597, 598.

Assuming, for the sake of argument, that the absence of positive proof on that subject is supplied in this instance by presumptions arising from the lapse of time, and other obstacles no less formidable to a recovery by the plaintiffs are encountered. The dedication to public use by plat filed by Richardson in 1854, vested the title to the strip known as Smith street, in Scotland county, in fee, in trust for the uses therein named or intended. It stands admitted that the county court of Scotland county reconveyed, by deed, this strip to Williams. As the deed is not in the record, and no objection was made to the evidence, we must assume that the deed was sufficient to remove the incumbrance complained of. How, then, can we assume that the ouster suffered by the plaintiffs in 1884, was owing to the incumbrance suffered by the grantor of Williams in 1854, when the case finds that the incumbrance was removed in the life time of Williams, and there is nothing in the record to connect the ouster with the supposed incumbrance, not even an appropriate allegation to that effect in the plaintiffs' petition.

While we do not intend to imply that the plaintiffs made out a case for equitable relief in other respects, the foregoing will suffice to show a sufficient failure of proof to warrant the judgment rendered.

The judgment is affirmed. All the judges concur.

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THE STATE EX REL. KNAPP, STOUT & CO. COMPANY, Respondent, v. JOHN FINN ET AL., Appellants.

St. Louis Court of Appeals, November 9, 1886.

1. **BONDS, OFFICIAL—PRINCIPAL AND SURETY.—The sureties on a second official bond given during the officer's term, and which recites that it is given in lieu of the former bond, are liable for the officer's defaults during his entire official term.**

2. **—— STATUTE OF LIMITATIONS—SHERIFFS.—The statute of limitations does not begin to run in favor of the sureties on a sheriff's official bond, where the sheriff has sold property under an order of sale in attachment proceedings, until, by final judgment or otherwise, the right to the proceeds in his hands shall have been determined.**

3. **—— An action brought on the bond by the plaintiff in the attachment proceedings within three years after the determination of the controversy in that suit is not barred, although the sheriff may have converted the money to his own use more than three years prior to the bringing of the suit on the bond.**

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

E. T. FARISH, for the appellants: The report which the sheriff makes under such orders of sale is like his return on an order of sale in a partition case, or on an execution, or any other process of court. And when such return is made, the statute of limitation is put in motion. *The State ex rel. v. Lidwell*, 11 Mo. App. 567; *Kirk v. Sportsman*, 48 Mo. 383. It appearing that the money was received during the running of the previous bond, and that the money was not on hand when the second bond was executed, the securities on the second bond are not liable. *The State to use v. Taylor*, 6 Mo. App. 277; *The State to use v. Witherson*, 40 Mo. 290; *United States v. Farrar*, 5 Pet. 373; Brandt on Suretyship, sect. 449.

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FRANK J. DONOVAN, for one of the appellants: The cause of action on the bond, if any, is barred by our statute of limitations. Rev. Stat., sect. 3231. Haggerty's estate can not be held liable for money received and converted by the principal in the bond when the conversion was prior to the execution of the bond. *The State to use v. Taylor*, 6 Mo. 277; *The State v. Atherton*, 40 Mo. 209.

G. M. STEWART, for the respondent: The bond sued on is, in legal effect, as obligatory on the sureties to pay the money sued for as if executed before it had been received by the defendant, Finn. *Pinkstaff v. The People*, 69 Ill. 148; *Scofield v. Sewell* [9 Hun] Sup. Court, N. Y. 157; *Steele v. Graves*, 68 Ala. 17; *Corprew v. Boyle*, 24 Gratt. 284; *The State v. Drury*, 36 Mo. 281; *Ingram v. McCombs*, 17 Mo. 558; *The State v. McCormick*, 50 Mo. 568. The statute of limitations did not begin to run until after the time limited in the order, after the copy of the order had been served, which was in June, 1883. *The State ex rel. v. Lidwell*, 11 Mo. App. 567–569; *The State v. Minor*, 44 Mo. 373; *Kirk v. Sportsman*, 48 Mo. 383; *Succession of Hugh McCloskey*, 32 La. An. 146; *Thurston v. Blockston*, 36 Md. 501; *Bonner v. Young*, 68 Ala. 35.

ROMBAUER, J., delivered the opinion of the court.

This cause was heretofore before this court, and its opinion on the former appeal is reported in 19 Mo. App. 560. When the cause was remanded, the plaintiff withdrew its demurrers to the defendants' answers, setting up the statute of three years limitation, and filed a general reply to such answers.

The following facts appeared in evidence on the retrial of the cause. The defendant, Finn, was elected sheriff of the city of St. Louis for a term of two years in November, 1878. On the twenty-first of November, 1878,

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he gave bond as such sheriff. On the twenty-ninth of November, 1879, he was ordered by the court to give a new official bond in lieu of the bond which he had formerly given, and did give such bond with his present co-defendants as sureties. The bond thus given recites that it was given in lieu of the bond approved November 21, 1878, and is conditioned that said John Finn shall well and faithfully in all things discharge the duties of the sheriff of the said city of St. Louis during his continuance in said office.

In December, 1878, the plaintiff instituted suit by attachment, and caused the writ of attachment to be levied on certain personal property, which was subsequently by order of court sold by Finn as sheriff. On the fourth of January, 1879, Finn made his report of sale under this order, but did not pay the money into court, not being ordered so to do. The amount realized was $2,122.14. The controversy in the attachment proceeding was not terminated until 1883. In that year, and while the cause was still pending in the supreme court, the parties compromised the litigation, and as part of such compromise, the proceeds of the attachment sale were assigned to the plaintiff. The plaintiff thereupon, on the fourth of June, 1883, obtained an order of court directing the sheriff to pay such proceeds to him. November 30, 1883, E. T. Farish, attorney in fact for the sureties, did pay to the plaintiff on this claim three hundred and fifty dollars out of fees earned by sheriff Finn during his official term, which had been assigned to him for the benefit of the sureties. No part of the balance was ever paid. The present action was instituted September 20, 1884, and within three years after the plaintiff became entitled to the fund by assignment.

There was evidence tending to show that Finn had converted the money in controversy to his own use, prior to November 29, 1879, the date of the bond sued upon in this action.

This being all the evidence the trial court instructed

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the jury to find for the plaintiff, and the only question raised by the appeal is whether the plaintiff upon the facts shown was entitled to judgment as a matter of law.

The defendant sureties contend, that they became by the terms of the bond responsible only for such defaults of their principal as occurred thereafter, and not for his defaults during his entire official term, and that the evidence tending to show that the default occurred prior to the date of the bond, should have been submitted to the jury. This view is not tenable. The bond sued upon by its terms purports to take the place of the bond originally given, which, for some reason not disclosed by the record, was deemed insufficient.

Where an officer proves a defaulter and has held the office under different appointments, with several sets of sureties, it is now settled that those sureties alone will be responsible who were on the bond at the time when the defalcation occured. *Draffin v. Boonville*, 8 Mo. 395; *The State v. Smith*, 26 Mo. 226, 231; *The State to use v. Atherton*, 40 Mo. 209, 220; *The State to use v. McCormack*, 50 Mo. 570. This, in the absence of a contrary intention, is the law even where the bonds are successive bonds under the same appointment. *Smith v. Paul's Ex.*, 21 Mo. 51. But in this case the bonds were given under the same appointment, and the contrary intention is manifest by the terms of the bond. The bond was to stand in lieu, or in place of the bond formerly given, and rendered the sureties responsible for the sheriff's conduct during his entire official term.

A question of greater difficulty is presented by the interposition of the special statute of limitations. It is conceded that a cause of action against a sheriff and his sureties for misconduct, such as is herein complained of, is barred by limitation unless the action is commenced within three years after its cause accrued. The default complained of is the default of the sheriff to pay over the money to the plaintiff when ordered so to do by the court, and the plaintiff contends that the action accrued

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when this order was disobeyed. On the other hand the defendants contend that the default consisted in not paying the money into court after the attachment sale, or rather of converting it after the sale to the sheriff's own use. The statute provides that the officer shall make return of the order of sale in attachment cases, at such time as shall be expressed in the order, showing how he has executed the same, "and the proceeds of the sale shall be paid into court or otherwise disposed of as the court or judge may order." Rev. Stat., sect. 425.

In the present case the officer did make a return in due time, and there was no order of court touching the disposition of the funds until June 4, 1883.

The defendants contend that the cause of action accrued when the sheriff made his return showing what funds were in his hands, and claim that the point is thus decided by the ruling of this court and of the supreme court in analogous cases of sales on execution and in partition. *The State ex rel. v. Minor*, 44 Mo. 373; *Kirk v. Sportsman*, 48 Mo. 383; *The State ex rel. v. Lidwell*, 11 Mo. App. 567. There is, however, a marked difference between the two cases. In the latter the execution creditor, or the distributee in partition, has a vested interest in the fund, which gives him a right in one case to demand its immediate payment to him, and in the other to intervene at once for its protection. It is not so in attachment proceedings. The interest of parties to the attachment suit is contingent upon the termination of the controversy. Suppose the plaintiff in the present proceeding had sued the sheriff for a conversion of the fund, prior to any adjudication that he was entitled to it, will it be contended that he could have recovered, if at all, substantial damages?

It has been held in Maine, in an action against a sheriff, for taking insufficient security in a replevin bond, that the statute began to run in the sheriff's favor only from the date of the final judgment in the

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replevin suit. The court in that case said that "whether the plaintiff in the case would be injured by the misconduct of the officer, could not be known until he had recovered judgment." *Harryman v. Wilkins*, 20 Me. 93. The very sensible view taken in that case was referred to with approval by our own supreme court in *Lesem v. Neal* (53 Mo. 419), where it was held that the cause of action against the sheriff for unauthorized release of attached property accrued only at the date of final judgment in the attachment suit.

In analogy with these cases we must hold that the plaintiffs' cause of action in this case did not accrue until the controversy, touching the ownership of the funds realized by the sheriff on attachment sale, was terminated. It is conceded that that was not terminated until 1883, and within three years prior to the institution of this suit. The facts, therefore, fail to support the plea of the statute and this point also must be ruled against the defendants.

The views taken by us on the points above stated, dispense with the necessity of passing on the effect of the alleged part payment made by the attorney of the sureties in November, 1883.

All the judges concurring the judgment is affirmed.

FREDERICK GERBER, Respondent, v. J. CRESAP McCOY, Appellant.

St. Louis Court of Appeals, November 9, 1886.

1. JUSTICES OF THE PEACE—JURISDICTION—PRACTICE.—That a suit before a justice on a contract is improperly joined with one in tort, is not jurisdictional unless the aggregate of both claims exceeds the amount of the justice's jurisdiction.

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2. —— APPEALS—DISMISSAL OF PART OF CAUSE OF ACTION.—On appeal from a justice, the plaintiff may dismiss a part of his cause of action, notwithstanding the statute which requires that the same case which was tried before the justice shall be tried on appeal.

3. PRACTICE—CONTINUANCE.—An application for continuance, on the ground of the absence of a party who is a material witness in his own behalf, stands on the same footing as one made on account of the absence of any other material witness.

4. —— The necessary absence of a party to a suit gives him no legal right to have his suit continued for that reason alone.

APPEAL from the St. Louis Circuit Court, GEORGE W. LUBKE, Judge.

Affirmed.

NAPTON & FROST, for the appellant: Actions *ex contractu* and *ex delicto* can not be joined in the same petition. *Phillips v. Flynn*, 71 Mo. 424; *Sumner v. Tuck*, 10 M. A. 269; *Threman v. Goodnight*, 17 M. A. 429.

EDGAR FLEMING and D. D. FASSETT, for the respondent: The misjoinder is an irregularity which does not go to the jurisdiction. *Southworth v. Lamb*, 82 Mo. 247. The circuit court properly permitted the dismissal of a part of its cause of action. *Transier v. Railroad*, 54 Mo. 191.

ROMBAUER, J., delivered the opinion of the court.

This suit was instituted before a justice of the peace. The plaintiff's statement contained two causes of action, one seeking to recover damages for breach of contract, the other damages for a tort. The plaintiff laid his damages at one hundred dollars, and at one hundred and fifty dollars, respectively, in the two causes of action. There was a verdict in favor of the plaintiff for eighty-six dollars, and the justice rendered a judgment accordingly, from which the defendant appealed to the circuit court.

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In the circuit court the defendant moved to dismiss on the ground that the justice had no jurisdiction. The court overruled this motion and permitted the plaintiff to elect on which of the two causes of action he would proceed. The plaintiff thereupon elected to proceed on the cause of action founded on contract, and dismissed as to the other.

The defendant's counsel thereupon filed an application for a continuance, stating in his affidavit that the defendant was necessarily absent, and was a material witness in his own behalf. The facts which the defendant would testify to, if personally present, were set out in the affidavit. The plaintiff conceded that the defendant would so testify, and consented that his affidavit might be read in evidence under the provisions of section 3596, Revised Statutes, whereupon the court refused to grant a continuance. The trial resulted in a verdict of one hundred dollars for the plaintiff, who remitted fourteen dollars of his recovery, and judgment was entered for eighty-six dollars in his favor.

The errors assigned by the defendant on this appeal are:

1. The court's action in overruling his motion to dismiss, and in permitting the plaintiff to elect.
2. The refusal of the court to continue the cause.
3. The admission of illegal testimony offered by the plaintiff.

I. The first assignment is untenable. The statement was defective in joining two causes of action which cannot legally be joined in the same suit, but as the justice had jurisdiction of both, and as the aggregate damages claimed did not exceed the jurisdiction of the justice, in either contract or tort, the defect was not jurisdictional.

Nor was the cause of action changed upon re-trial in the circuit court. The statute provides that "the same cause of action, and no other, that was tried before the justice shall be tried before the appellate court, upon the appeal," but it does not provide that where a party tries

several causes of action before a justice at the same time, and in the same suit, he is bound to re-try them all on appeal, or else fail altogether. The plaintiff was under no obligation to join his causes of action in the same suit in the first instance, and he could abandon either of them, either before the justice, or in the circuit court, where the cause is tried *de novo*.

The question in such cases is, at most, one affecting costs, and no question as to costs has been saved in this record.

II. The court committed no error in refusing a continuance. The application, as disclosed by the affidavit, was made because the defendant was a material witness in his own behalf, and to that extent the application was sustained by permitting the reading of the affidavit in evidence.

If the presence of the defendant at the trial was essential in other respects, the affidavit fails to disclose it. The necessary absence of a party does not give him a legal right to have the trial of his cause continued. *Owens v. Tinsley*, 21 Mo. 425.

The last objection is likewise untenable. The evidence complained of is that of the plaintiff, who, when examined in his own behalf, went on in a rambling way, stating at times matters of hearsay. The questions put to the witness were unobjectionable, although part of his answers were unquestionably objectionable. The court endeavored to confine the witness to the statement of facts which were legal evidence, but was not entirely successful in this endeavor. The only proper course in such cases is to confine the objection to such parts of the witness' answer as are liable thereto, and have them withdrawn from the consideration of the jury. This was not done in the present case.

All the judges concurring the judgment is **affirmed.**

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M. D. CARRINGTON ET AL., Respondents, v. PETER HANCOCK ET AL., Appellants.

St. Louis Court of Appeals, November 9, 1886. 23 299 118m196

1. APPELLATE PROCEDURE—MOTIONS—NEW TRIAL—ARREST OF JUDGMENT.—A motion for new trial, filed after a motion in arrest of judgment has been overruled, will not authorize an appellate court to review matters of exception saved at the trial.

2. ———. DEFECTS CURED BY VERDICT.—If the petition states facts essential to the plaintiff's recovery, defects in its form are cured by verdict, and can not be reached by a motion in arrest of judgment.

APPEAL from the Clarke County Circuit Court, BEN. E. TURNER, Judge.

Affirmed.

MATLOCK, HILLER & HOWARD, and ANDERSON, DAVIS & HAGERMAN, for the appellants.

DYER, LEE & ELLIS, for the respondents.

ROMBAUER, J., delivered the opinion of the court.

This cause has been fully and ably argued before us on several points, but owing to the peculiar state of the record, the only point we are at liberty to consider is whether the petition states facts sufficient to constitute a cause of action.

It appears by the transcript that a motion in arrest of judgment was filed and overruled prior to filing any motion for a new trial. The case of *McComas v. The State* (11 Mo. 116), decides that a motion for new trial comes too late after motion in arrest, as the latter presupposes the verdict to be right. This rule was subsequently modified in *Farmers Bank v. Bayliss* (41 Mo. 275, 286), to the extent that where both motions are filed

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on the same day, and the motion for new trial is first disposed of, the latter motion may be considered on appeal, but the rule was re-affirmed to the extent that after the overruling of a motion in arrest it is too late to file a motion for new trial, and such is still the law in this state.

It has been ably argued by counsel for the appellants that it is illogical to hold that parties intended to waive errors in the trial by a motion in arrest which expressly asserts such errors, and is in substance both a motion for new trial and in arrest, as the present motion. Plausible as this argument may seem, we are bound to follow the last controlling decision of the supreme court, and are not at liberty to explain it away because, perchance in our opinion, it may not rest on a logical foundation. No rule which is not certain can be just.

The action is one to recover a balance claimed to be due to the plaintiffs from the defendants on a running account. The petition states that "from the —— day of———, 1881, up to and after the ninth day of November, 1882, the said plaintiffs bought and sold for the defendants various lots of grain, etc., all of which will fully appear by the itemized account of said dealing which is herewith filed."

The appellants claim that the petition is insufficient in not averring that the grain was bought and sold at the defendants' request. This defect, if any it be, is not the omission of an essential averment, but at most its inartificial statement, and is cured by verdict. *Coal Company v. Brewing Co.*, 20 Mo. App. 16, 19.

The judgment is affirmed. All the judges concur.

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GREELEY-BURNHAM GROCER COMPANY ET AL., Respondents, v. GEORGE W. CAPEN, Appellant.

St. Louis Court of Appeals, November 9, 1886.

1. AGENCY—CONTRACT.—A contract having been made by an agent who had full authority to make it on behalf of his principal, is not affected by the agent's inaccurate report of its terms to his principal.

2. ——— EVIDENCE—PRESUMPTIONS—PRACTICE.—If, upon a reasonable construction of the correspondence and course of dealing between an alleged agent and his principal, the agent's authority is presumable as a fact, the trial court will not declare as a matter of law that the agent had no authority.

3. STATUTE OF FRAUDS—SUFFICIENT MEMORANDA.—"Sold notes" constitute sufficient memoranda under the statute of frauds, although they omit to state the time of delivery of the goods sold.

4. ——— Under the statute of frauds, the contract need not be in one writing, but it may be established by the letter correspondence between the parties.

APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Affirmed.

R. M. NICHOLS, for the appellant: The evidence discloses that S. B. Pike & Co. were only factors of George W. Capen, and as such he had no authority to sell goods for the account of his principal which had not been consigned to him. Wharton on Agency and Agents, sect. 735; Story on Agency, sect. 28, and note 165 [8 Ed.] 1 Benjamin on Sales, sect. 244; Edwards on Factors and Brokers, sects. 1 and 97. There was no contract, under the statute of frauds. *Steinberg v. Kintzing*, 39 Mo. 221; *Townsend et al. v. Drakeford*, 1 Car. & K. 22; *Goodman v. Griffith*, 1 Hurl. & N. 573; *Cooper v. Smith*, 15 East. 102; *Grant et al. v. Fletcher et al.*, 5 Barn. &

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Cres. 436; *Thornton v. Kempster*, 5 Taunt. 487; *Gregson v. Ruck*, 4 Ad. & El. 744; Reed on Statute of Frauds, 349; Wood on Frauds, note to sect. 430; 1 Chitty on Contracts, 551. The Gould sale tickets and the letters November 4, *et seq.*, can not satisfy the statute of frauds. While the statute of frauds may be satisfied by different papers, they must have some reference to each other, and that reference must appear from the respective writings, and these respective writings must coincide with reference to the terms and conditions of the contract. Reed on Statute of Frauds, sects. 276, 341; Wood on Frauds, sects. 430–2; Story on Agency, sect. 243, and cases cited; *Smith v. Schell*, 82 Mo. 215; *Scarritt v. St. John's M. E. Church*, 7 Mo. App. 173; *Broecker v. McGowan*, 12 Mo. App. 207; 1 Benjamin on Sales, sect. 222. The letter of November 4, and all subsequent and prior letters between Pike and Capen, and the evidence admissible to prove a sale in the case, show the transactions in this controversy to be mere orders, and not sales by Pike for Capen. *Banks v. Chas. P. Harris Mfg. Co.*, 20 Fed. Rep. 667; *Stagg v. Compton*, 81 Ind. 130; *Lincoln v. Erie Press Co.*, 132 Mass. 129; *Smith v. Gowdy*, 8 Allen, 566; Reed on Statute of Frauds, sect. 396, note E.

FORD & PAYNE, for the respondents: A sufficient memorandum of the various sales to satisfy the statute of frauds, may be collected from the correspondence passing between the defendant and his agent subsequent to the sales (especially the letters of November 4, 12, and 17, 1885). *Gibson v. Holland*, 1 Law Rep. [C. P.] 1; *Bailey v. Sweeting*, 9 C. B. N. S. 843; *Moore v. Mountcastle*, 61 Mo. 425; *Faunsend v. Hargrave*, 118 Mass. 335; *Lash v. Parlin*, 78 Mo. 391; *Heideman et al. v. Wolfstein*, 12 Mo. App. 366. In addition, the bought notes are sufficient memoranda. *Barclay v. Bates*, 2 Mo. App. 139, 145.

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THOMPSON, J., delivered the opinion of the court.

These are several actions for damages for the non-delivery of goods alleged to have been purchased of the defendant by the plaintiffs and their assignors, through S. B. Pike & Co., his agents for the sale of his goods, at the city of St. Louis. The suits were originally commenced by attachments before a justice of the peace, and such proceedings were had in the circuit court that all of them were tried together, the same evidence being for the most part applicable to all the cases, and all of them turning upon the same facts. The trial was had in the circuit court before a judge sitting as a jury, and the plaintiffs had in all the cases a verdict and judgment. Appeals have been prosecuted to this court upon a single record in the consolidated causes.

Three objections are made to the judgment, all of which arise under the defendant's motion for an instruction in the nature of a non-suit: 1. That the evidence discloses no contract between the parties. 2. That the written memoranda appealed to as evidence of the alleged contracts are insufficient under the statute of frauds. 3. That there was no evidence tending to show that S. B. Pike & Co. had authority from the defendant to make the sales in question.

We have examined this record with much care, and have been aided in our examination by a very thorough and creditable printed statement and argument furnished us by the appellant's counsel, but we have been unable to arive at a different conclusion from that reached by the learned judge of the circuit court.

I. Upon the first point we do not think that any extended observations are required. The evidence clearly shows that the contracts, as alleged, were, in fact, made, and that their terms were clearly understood by the plaintiffs, and also by S. B. Pike & Co., through whom they were made on behalf of the defendant. If S. B. Pike & Co. had authority from the defendant to make them,

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there is no ground for any discussion as to the fact of their having been made, although there was a discrepancy in their terms as made and as reported by S. B. Pike & Co. to the defendant. But if Pike & Co. had authority to make the contracts, their inaccurate report of their terms to the defendant was matter subsequent which could in no way affect the rights of the other contracting parties.

II. Upon the next point, whether the memoranda by which the contracts are evidenced are sufficient to take the case out of the statute of frauds, the propriety of the conclusion of the circuit court seems equally clear. These memoranda consist in all the cases but one of "sold notes," given to the respective purchasers, who are either these plaintiffs or their assignors, by Mr. Gould, a broker employed by S. B. Pike & Co., as their agent to effect the sales, and also of the reports of the sales made by S. B. Pike & Co. to the defendant as their principal. In respect of the sales in which these "sold notes" were given, the sold notes themselves were sufficient to take the case out of the statute of frauds. The following may be quoted as a specimen of each of them:

"ST. LOUIS, October 30, 1885.

"Sold to G. A. Eckerle & Co. for acct. of S. B. Pike & Co.

"25 cases Am. 1-4 sardines at $6.00 f. o. b. Portland. * * * Terms of sale, cash on arrival, less 3 per cent. Shipping directions, cheapest.

"WM. T. GOULD,
"Merchandise Broker."

The objection that the time of delivery is not stated in this sold note seems immaterial, because the law would annex the condition of delivery within a reasonable time under the facts of the case in conformity with the manifest understanding of the parties. In respect of the sale

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which had been made by S. B. Pike & Co. to Mr. Boswell, in which no sold note had been given, it is sufficient to make this observation, which will equally apply to the other cases. That the terms of the sale were reported by S. B. Pike & Co. to the defendant; that the reply of the defendant to S. B. Pike & Co. shows that he understood the terms; that the subsequent correspondence shows that he finally repudiated the sales and endeavored to cast the loss upon S. B. Pike & Co., not because of any misunderstanding as to the terms of the sales, but because he could not get the fish. All this matter rests in the form of these sold notes and the subsequent correspondence by letter and telegram. These memoranda relating to the same subject matter taken together, as we are entitled to take them, under a well settled rule (*Heideman v. Wolfestein*, 12 Mo. App. 366; *Moore v. Mountcastle*, 61 Mo. 424), make the terms of the sale entirely clear without resort to parol evidence, and take the case out of the letter and policy of the statute of frauds. It is true, as already stated, that a slight discrepancy existed in respect of the price named in the sold notes, and that at which they were reported by S. B. Pike & Co. to the defendant in his letter of November 4. But on this point it is sufficient to say that the price, as reported, was within the express authority which Pike & Co. had received from the defendant; that the discrepancy was subsequently explained to the defendant by Pike & Co. in a letter dated November 17, which we are entitled to look to as part of the memoranda furnishing evidence of the transactions, and that it was also explained by parol evidence at the trial, which evidence our supreme court has held may be appealed to in certain cases to help out memoranda of sales of merchandise in respect of the statute of frauds. *Lash v. Parlin*, 78 Mo. 391; *Oneil v. Crain*, 67 Mo. 250. As the plaintiffs are seeking to hold the defendant to the contract as made with his agents, S. B. Pike & Co., and not

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as reported by S. B. Pike & Co., this objection becomes quite unsubstantial.

III. The most serious question in the case, and the one to which we have given the most attention is whether there was substantial evidence tending to show that S. B. Pike & Co. had authority from the defendant to make the contracts in question. It is fortunate that the question is not complicated by any element of the alleged agent being held out by the alleged principal in a given character, but depends entirely upon the interpretation to be given to a series of letters and telegrams, the genuineness of which is admitted, which, together with actual transactions, furnish the sole evidence of the understanding which subsisted between the defendant and S. B. Pike & Co. This correspondence shows conclusively that the defendant, who was a manufacturer of sardines, having two factories at Eastport, Me., constituted S. B. Pike & Co., his agents, to sell sardines of his manufacture in the St. Louis market, to receive consignments of such sardines, to receive the invoices of the same, and to collect and transmit to the defendant the proceeds of such sales as they should make, less an agreed commission. It also shows beyond dispute that S. B. Pike & Co. were not limited by the defendant to the selling of sardines of the defendant, which had actually been received by S. B. Pike & Co., but they were authorized to sell, "to arrive," any sardines which had been or should be shipped by the defendant to them upon advice of the shipments. So far, we understand, there is no dispute, and there is no room for any doubt upon the correspondence and actual transactions of the parties.

But the sales in controversy were neither of goods of the defendant in the actual custody of S. B. Pike & Co., nor of goods which had actually been shipped by the defendant to S. B. Pike & Co., and which were in transitu at the time sales were made by the latter, and the crucial question is whether upon a fair interpretation of the correspondence, viewed in the light of what was

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actually done by the parties on authority from the defendant to S. B. Pike & Co., to sell for future delivery goods which had not been shipped, could be inferred by the circuit judge as the trier of the facts. We have come to the conclusion that it could. The sales in controversy were made on the twenty-eighth and thirtieth of October, 1885. Previous to that time, from about the first of September, Pike & Co. had been selling, as the defendant's agents or factors, his sardines both in the custody of Pike & Co. and in transitu, for cash, and remitting the cash to the defendant. The defendant had kept a stream of consignments flowing toward Pike & Co., faster at one time than Pike & Co. could work them off, and had continued to advise Pike & Co. from time to time of the scarcity of fish and of the continued advance of prices which was being made by the American Sardine Exchange, by whose prices, called "combination prices," Pike & Co. were to be governed in making sales, and Pike & Co. had been, with the defendant's approbation, selling goods to arrive. On the thirtieth of September, the defendant notified Pike & Co. that his terms of sale meant goods delivered in Portland, Me., the buyers to pay the freight. We do not consider this letter of itself an authorization to Pike & Co. to sell goods which the defendant did not have, but we regard it rather as a form, or mode of fixing the price, and as meaning that the goods would be sold for "combination prices" at St. Louis, with the addition of the freight from Portland, Me.

On the thirteenth of October the defendant telegraphed to Pike & Co.: "Sell as per No. 4, discount and commission six half,"—meaning that they were to sell at the prices named in circular number four of the American Sardine Exchange, and that the defendant would allow them a discount and commission of six and a half per cent. On October 16, Pike & Company replied by letter, acknowledging this telegram, quoting it in their letter, and saying, among other things: "We have to-

day sold A. C. L. Haase & Son, St. Louis, 100 cases oil to arrive at $6.00 at Portland, 5 per cent. off for cash. Will mail shipping directions to-morrow." Subsequently shipping instructions were mailed. This sale was not made of any sardines which were in transitu, but nevertheless the defendant made no objections to it, but shipped the goods on the twenty-third of October, in accordance with the shipping directions. This transaction, it will be perceived, took place prior to the dates of the sales in controversy, and S. B. Pike & Co. received notice of the compliance of the defendant with it prior to such dates. Moreover, the correspondence shows that the defendant did not even have the goods on hand to comply with this contract of sale at the time when notification of it was received. Now this was as distinct and unequivocal notification to the defendant as could have been made by Pike & Co. that it was their understanding that they had authority from the defendant to effect sales of his goods in St. Louis, although the goods were not in their possession or in transitu from the defendant to them. If the defendant had not intended to clothe them with this authority he should manifestly have given them a distinct notification of that fact at that time. Instead of doing this he wrote to them, on the twenty-seventh of October, a letter in which the following sentences occur: "If fish are scarce the balance of the packing season as they have been, there will not be any ¼ oil on the market this winter, and I do not see but that they will have to take mustards. If I have any for shipment will telegraph soon, you can sell to arrive before the new prices take effect. I have not received any fish this week." The new prices were to take effect, as S. B. Pike & Co. had already been notified, on the thirty-first of October, and it is not very clear why they were authorized to sell to arrive before the new prices should take effect, since it would take three days at least for the letter to reach St. Louis, and S. B. Pike & Co. would not have, at

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most, more than one day in which to make any sales before the new prices would take effect. We do not understand that the evidence shows the date on which this letter was received by Pike & Co., but a memorandum on the letter itself shows that it was answered on the thirty-first of October, a day later than any of the sales in controversy. As there is no evidence that the letter was received prior to any of the sales in controversy, of course, it can not be read as giving to Pike & Co. a precedent authority to sell fish which they did not have in their possession, and which had not been shipped, such as would cover the sales in controversy. But, like evidence of subsequent declarations in actions for libel or slander, it speaks very persuasively upon the question of the actual intent and understanding of the defendant, especially in connection with the fact that he had but four days before ratified the act of Pike & Co. in selling to Haase & Son one hundred cases to arrive which had not been shipped.

The learned counsel for the defendant endeavors to explain away the effect of this language by asking us to regard the word "soon" as a manifest clerical error and to read it "so as" or "so on." There is no principle upon which we can thus change the meaning to the text. A clerical error is not manifest except the error of omitting a point of punctuation, which error the defendant's letters show him to have been in the habit of making. *Maladicta est interpretatio quae corrumpit textum.* Then what took place in respect of these particular sales was that Pike & Company seasonably notified the defendant that they had made them, requesting shipments of fish to meet them. At the same time they wrote to the defendant on the twenty-ninth of October: "Have not offered as freely as we might have done, fearing you could not fill the orders, and all buyers want immediate shipment. Let us know how this is. Can we sell all we can take orders for at your limit? Please wire us and advise fully by letter." On the same day

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Pike & Company telegraphed this question to the defendant: "Can we sell oils freely at your limit, immediate shipment?" To which the defendant replied by telegraph: "Cannot fill orders. Fish scarce. Will ship if get any. * * *." Pike & Company responded on the same day by telegraph: "Must surely get eight hundred fifty cases to fill orders." On the same day they advised the defendant by letter, saying: "It will be a devil of a mess if you can not fill orders we have taken for oil—850 cases to date. Hearing nothing from you to the contrary and having no limit, we expected you could ship all we ordered. * * * What we have sold were for immediate shipment and parties will not release us." On the same day the defendant telegraphed and wrote Pike & Co. that he had ordered Meyer & Company to turn over to them a quantity of sardines in their hands, comprising, as stated in the letter, two hundred and thirty-four cases of one-fourth oils. On November fourth the defendant sent this telegram to Pike & Company: "Quarter for tenth seven dollars. Do not sell ahead; fish scarce." This, as shown by a letter of the same date, admonished them that after the tenth of November one-fourth oil sardines would be advanced in price to seven dollars. It was the first intimation they had received from the defendant in direct terms that they were not to "sell ahead." On the fourth of November Pike & Company wrote to the defendant explaining fully the transactions which had resulted in these sales of eight hundred and fifty cases one-fourth oil which include the sales in controversy, admonishing him that they were actual sales, not offers, for cash, and insisting upon his compliance with the contracts. They received a letter from the defendant, dated November 9, making no allusion to this letter, but saying: "Fish are as scarce as ever. We are looking for some every day, but it is hard to tell when we will get them." It was not until the twelfth of November that the defendant acknowledged the receipt of this letter of the fourth, in

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which he said: "I have delayed in answering in order to see if I could get fish to fill orders; but as fish are a failure I do not see how you can expect me to fill orders. I do not see but what you will have to notify the parties that you cannot fill orders for the above reasons. If they are reliable parties they will most assuredly see that you are not to blame or any one else for failure to do so. * * * Hoping this statement will release you from your obligation; if not, the parties will have to wait for another season." This, the first intimation of the defendant of a purpose to repudiate the contract, took place, it will be perceived, two days after the date at which the advance of one-fourth oil sardines to seven dollars, which had been made by the American Sardine Exchange, went into effect. Several other letters passed from Pike & Company to the defendant, complaining of the defendant's failure to ship these eight hundred and fifty cases, and it was not until November 24, that the defendant wrote to them a letter distinctly repudiating their authority to make sales of the eight hundred and fifty cases.

This letter was in the following language: "Your letters in reference to the 850 cases one-fourth oil sardines sold by you is a surprise to me after what I have written to you about fish being scarce, and the Exchange circulars relating to the same thing. I do not see how you could make such a mistake and then write me and tell me that it is my fault. I did not authorize you to sell ahead and only shipped to you to sell on arrival, and shall not ship or make good any part of the 850 cases you may have sold ahead without my order."

It should be stated, in justice to the position taken by the learned counsel for the defendant, that the defendant had, in frequent letters and circulars of the American Sardine Exchange, advised Pike & Company of the continued scarcity of fish. We think, however, that this correspondence taken together and read in con-

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nection with the sale to Haase & Son and its ratification by the defendant fairly authorized the trier of the facts to conclude that the defendant had given to Pike & Company a general authorization to sell his goods in St. Louis without restricting them in any respect except as to price, and that while he had advised them from time to time concerning the scarcity of fish, this was in the nature of a caution to them and not as a limitation of his instructions; that the defendant had authorized Pike & Company to sell goods to arrive without any limitation as to whether the goods had been in fact shipped at the time of the sale or not; that he did not revoke this authorization until after the making of the sales in question; that he did not repudiate the sales in question as long as there was a prospect of his being able to get the fish to fill them, and not at all until thirteen days after they had been made, and until an advance in the so-called combination prices for sardines had taken effect. A business man, we think, would reach the conclusion upon this correspondence that the defendant was quite willing to take the benefit of the contracts of sales made for him by the business diligence of Pike & Company as long as the contracts could be made beneficial to him, but that when it appeared that he could not comply with them without loss he determined to unload the loss upon his agents. The circuit court, we think, was right in not allowing him to do this.

The judgment of the circuit court will be affirmed. It is so ordered. All the judges concur.

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MARY ROGAN, Respondent, v. JOHN DOCKERY, Appellant.

St. Louis Court of Appeals, November 9, 1886.

1. APPELLATE PROCEDURE—EXCEPTIONS—EVIDENCE—NON-SUIT.—A general statement, following a detailed statement of the evidence in a bill of exceptions, that there was oral evidence tending to support the instructions given, is conclusive against a claim that the plaintiff should have been non-suited for want of evidence showing a right of recovery, if the hypothetical facts stated in the instructions show a legal right of recovery.

2. LANDLORD AND TENANT—REPAIRS.—In the absence of any agreement to keep leased premises in repair, a landlord is under no legal obligation to his tenant to do so.

APPEAL from the St. Louis Circuit Court, GEORGE W. LUBKE, Judge.

Reversed and remanded.

JEWETT & L. J. SMITH, for the appellant: The landlord's promise to repair the premises after the tenant has entered is without consideration and void. Taylor, L. & T., sect. 329; *Sibley v. Telford*, 48 Me. 316. The tenant is bound to keep the demised premises in repair. Taylor, L. & T., sect. 327; *Val v. Weld*, 17 Mo. 232; *Griffith v. Lewis*, 17 Mo. App. 614.

JOHN A. GILLIAM and JOHN W. DRABELLE, for the respondent: Dockery was bound, as a landlord, to make repairs, the tenancy being from month to month. *Griffith v. Lewis*, 17 Mo. App. 613; *Gandy v. Jubber*, 5 Best & Smith, 78. Dockery was also liable as a landlord, because he had no responsible superior, and he was agent of no one. Story's Agency, sect. 264, p. 310 [7 Ed.]; sect. 280, p. 352 [7 Ed.]; *Blakely v. Benecke*, 59 Mo. 193. By inducing Mrs. Rogan to rent these prem-

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ises, and afterwards giving her permission to continue to use the steps until he got them repaired, Dockery became directly liably to her for the injury she sustained. *Sweeney v. Railroad*, 10 Allen, 374; *Market v. St. Louis*, 56 Mo. 189.

THOMPSON, J., delivered the opinion of the court.

This was an action by a tenant against her landlord for damages for a personal injury received by her through the non-repair of the demised premises. There was a jury trial and a verdict and judgment for the plaintiff. The bill of exceptions, after setting out the substance of the evidence, recites that "there was other oral evidence tending to support the instructions given to the jury." As it is not claimed in the points submitted to us by the appellant that the court erred in refusing instructions, we can, in this state of the record, look no further than to see that the instructions which were given were correct in point of law. This recital, moreover, precludes us from holding that the defendant was entitled to have the plaintiff non-suited, because it is a distinct notification that the bill of exceptions does not contain all the evidence. *Hackman v. Maguire*, 20 Mo. App. 286. In the case just cited the general recital in the bill of exceptions was that "plaintiffs introduced other evidence tending to establish the allegations in their pleadings herein," and we held that, in the face of this recital, we could not say upon the record that the defendant was entitled to have the plaintiff non-suited. The rule must be equally applicable, under the recital that "there was other oral evidence tending to support the instructions given to the jury," unless these instructions were bad in point of law; for if they were good in point of law, and if there was evidence in the case to which they were applicable, the court was warranted in submitting them to the jury; and if the court was warranted in submitting any questions of fact to the jury,

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manifestly the defendant could not have been entitled to an instruction for a non-suit.

The first instruction given for the plaintiff was erroneous because it embodied the proposition that, in a tenancy from month to month, as this was, the landlord is bound, as matter of law, to repair such a defect in the premises as was shown by the evidence. As between the landlord and the tenant, the landlord is not liable to repair at all, unless he undertakes to do so. The general rule is that there is no warranty by the landlord to the tenant that the demised premises are in good repair or fit for any particular use (*Jaffe v. Harteau*, 56 N. Y. 398; *O'Brien v. Capwell*, 59 Barb. 497; *Cleaves v. Willoughby*, 7 Hill, 83; *Post v. Vetter*, 2 E. D. Smith, 48; *Howard v. Doolittle*, 3 Duer, 464; *Robbins v. Mount*, 4 Robbt. 553; *Flynn v. Hatton*, 43 How. Pr. 333; *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, 12 Mees. & W. 68; *Chappell v. Gregory*, 34 Beav. 250; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Dutton v. Gerrish*, 9 Cush. 242; *Royce v. Guggenheim*, 106 Mass. 201; *Loupe v. Wood*, 51 Cal. 586; *Elliot v. Aiken*, 45 N. H. 30; *Scott v. Simons*, 54 N. H. 430); and that the tenant has no remedy against the landlord for suffering the premises to get out of repair, unless the landlord has agreed to keep them in repair. *Kahn v. Love*, 3 Or. 206; *Mumford v. Brown*, 6 Cow. 475; *Howard v. Doolittle*, 3 Duer, 364; *Brewster v. DeFremery*, 33 Cal. 341; *Sherwood v. Seaman*, 2 Bosw. 127; *Doupe v. Genin*, 45 N. Y. 119; s. c., 37 How Pr. 5; 1 Sweeny, 25; *Joyce v. DeGiverville*, 2 Mo. App. 596.

The landlord may, indeed, be liable *to a stranger* for allowing a nuisance to collect on his premises in consequence of his failure to keep them in repair, as we held in *Griffith v. Lewis* (17 Mo. App. 605), because the law casts upon the owners of real property the general duty of keeping such property free from nuisances, and because it would be unreasonable to cast upon a tenant

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from month to month the duty of making expensive repairs for the purpose of abating a nuisance which he did not create. But it by no means follows from this that the landlord will be so liable to his tenant. His liability to strangers is grounded on the general duty, that is formulated in the maxim, *sic utere tuo ut alienum non laedas*, of so using his property as not to injure that of others. But his obligation to his tenant rests in contract only, and, in the absence of a statute or of an express agreement, is governed by the implication which the law annexes to the contract, which is, that the tenant is willing, for the rent agreed to be paid, to take the premises as he finds them, subject to any inconveniences or dangers which may attend his occupancy of them. Because the tenant is not liable to a stranger to repair, it does not follow that the landlord is liable to the tenant. The tenant of a term from month to month is not so liable to a stranger, because he has not agreed to become so, and the law does not annex the obligation to so short a term. For a similar reason the landlord is not in general so liable to the tenant; unless he has agreed to become so, the law does not annex to him the obligation.

It thus appears that the case was submitted to the jury on a theory of a landlord's liability to his tenant which was fundamentally erroneous; and this renders it unnecessary to consider the other questions which have been argued.

The judgment is reversed and the cause remanded. All the judges concur.

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W. T. AUSTIN, Appellant, v. J. W. BOYD, Respondent.

St. Louis Court of Appeals, November 9, 1886.

1. **STATUTE OF FRAUDS—PART PERFORMANCE.—Under evidence tending to show a contract for the sale of a lot of tobacco, it is error to non-suit the plaintiff, who seems to enforce the contract, although there is no written memorandum of the sale signed by the defendant, where a part of the tobacco has been delivered.**
2. **EVIDENCE—BEST.—The rule which requires the production of the best evidence does not require that the best witness to a fact provable by oral evidence shall be produced.**
3. **——— WITNESSES—REFRESHING MEMORY.—A person who was present at an auction sale is competent to prove what occurred at the sale, although the auctioneer is not produced or his absence accounted for, and he may refresh his memory from memoranda made at the time.**

APPEAL from the St. Louis Circuit Court, W. H. HORNER, Judge.

Reversed and remanded.

JOHN R. CHRISTIAN, for the appellant: The sale was good under the statute of frauds, because of the delivery of a part of the goods sold. *Rickey v. Tenbroeck*, 63 Mo. 563. The evidence was properly admitted. *Wernwag v. Railroad*, 20 Mo. App. 473.

BROADHEAD & HAEUSSLER, for the respondent: Under the evidence there was no sale in bulk. The price per one hundred was merely fixed; each package was to be paid for before delivery; no delivery of part on account of all; no payment on account of all; no memoranda signed by either party. The possession and ownership never changed as to either package, and was not to change until paid for, and under section 2514, Revised Statutes, 1879, the defendant was not liable. *Kirby v.*

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Johnson, 22 Mo. 354; *Harvey v. St. Louis Butchers' Association*, 39 Mo. 211; *Cunningham v. Ashbrook*, 20 Mo. 553.

Thompson, J., delivered the opinion of the court.

The petition states in substance that the defendant bought of the plaintiff, thirteen hogsheads of tobacco, at eight dollars per hundred; that he received and paid for six of them in pursuance of the contract of sale, but refused to receive and pay for the remainder; that the plaintiff, after keeping the remaining hogsheads for a time stated, after having given the defendant ample notice, advertised and exposed the same for sale to the highest bidder; and prays judgment for the difference between the price which the remaining hogsheads brought and the price which the defendant had agreed to pay for them. The answer traverses all the allegations of the petition. After hearing the evidence the court instructed the jury that the plaintiff was not entitled to recover.

I. The plaintiff gave evidence tending to support the substantial allegations of his petition, as above set out. The defence was the statute of frauds. It is plain that the court erred in the instruction for a non-suit, since the delivery of a part of the tobacco under a contract for the sale of the whole would take the case out of the statute. *Rickey v. Tenbroeck*, 63 Mo. 563. And whether this was the nature of the contract, was, in the state of the evidence, a question of fact for the jury.

II. The court refused to allow a witness, who had kept the books of the commission house through which the contract was alleged to have been made, to refer to the books to refresh his memory upon a material point. This was error.

III. The court refused to allow the same witness to testify as to the prices for which the remaining hogsheads of tobacco were sold, after using the books to refresh his memory, on the ground "that the auctioneer was the best evidence, and as he was not there nor ac-

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counted for, no one else could testify." This was clear error. It was not proposed to prove the facts by the books, but merely to allow the witness to refer to the books in order to refresh his memory. There is no rule of evidence in pursuance of which one competent witness, who is willing to swear to a fact, can be excluded on the ground that some other person may be supposed to have better knowledge of the fact, which other person is not produced or accounted for.

The judgment will be reversed and the cause remanded. It is so ordered, with the concurrence of all the judges.

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C. G. CLOUD, Respondent, v. INTERNATIONAL BOOK AND NEWS COMPANY, Appellant.

St. Louis Court of Appeals, November 9, 1886.

1. NEGOTIABLE INSTRUMENTS—HOLDER FOR VALUE—BAD FAITH.—The question of negligence in the purchase of negotiable paper for value before maturity, is material only as bearing on the question of bad faith in making the purchase.

2. ——— PRESUMPTIONS—BURDEN OF PROOF.—The transferee of negotiable paper before maturity, is presumed to have acquired it in good faith, and the burden is on him who claims the contrary.

APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Affirmed.

CREWS & BOOTH, for the appellant: The respondent could only recover on the ground that he acquired the note, *bona fide*, for value, in the usual course of business, before maturity, and without notice of any circumstance impeaching its validity. Daniel on Neg.

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Inst., sects. 812, 819; *Johnson v. McMurry*, 72 Mo. 278; *Hamilton v. Marks*, 63 Mo. 167. He took the nore in bad faith. *Barr v. Baker*, 9 Mo. 850; *Edwards v. Thomas*, 66 Mo. 47; *Cass Co. v. Green*, 66 Mo. 498; *Baldwin v. Whitcomb*, 71 Mo. 651.

BOYLE, ADAMS & McKEIGHAN, for the respondent: Bad faith of the transferee of negotiable paper to defeat title must be shown by the person assailing the holder's title. *Hamilton v. Marks*, 63 Mo. 167; *Goodwin v. Simonds*, 20 How. [U. S.] 343; *Murray v. Lardner*, 2 Wall. 110; *Johnson v. McKinney*, 72 Mo. 278.

THOMPSON, J., delivered the opinion of the court.

Action on a promissory note. The defence, substantially, was that the payee of the note had procured it of the defendant under an arrangement by which they had "swapped notes" with each other, so to speak, he giving to the defendant, at the time of receiving this note, and in exchange for this note, his own note payable to the defendant, of even date, amount, and time, with this note; that he had failed to pay his note so given to the defendant in exchange for this note; and that the plaintiff took this note with notice of the circumstances under which it was given.

I. The evidence showed that the note was given under the circumstances above stated, that it was purchased by the plaintiff of the payee for value before maturity, without notice of any of the above facts.

Upon this evidence the court instructed the jury that no evidence had been given sufficient to establish a defence to the note, and that they must find for the plaintiff. This direction was clearly right. We re-affirm the following propositions of law laid down by this court in *Mason v. Bank of Commerce* (16 Mo. App. 277): "That the holder of an unmatured negotiable promissory note indorsed in blank is, *prima facie*, the owner thereof, with full power to dispose of the same; and that whoever purchases it from him for value gets a good title

thereto, in the absence of knowledge of circumstances affecting the title of such holder, provided such purchaser act in good faith. It is not sufficient to destroy his title that there were circumstances sufficient to put a prudent man upon inquiry, or that he may have been negligent in failing to avail himself of his means of knowledge. The test of his rights is not negligence, or diligence, but it is good faith or bad faith; although the fact of negligence may, under circumstances, be evidence tending to show bad faith." There were no circumstances in the evidence in this case tending to show bad faith, or even negligence. The plaintiff, being a banker, purchased the note of the payee upon his representation that it had been given for the purchase money of a stock of books, and he knew that the payee had previously owned a stock of books, and, from the defendant's corporate name, he was warranted in concluding that they were dealers in books. The circumstance that he was not a banker in St. Louis, where the maker and the payee of the note both lived, was of no moment; since notes are every day discounted by distant bankers, and especially since the explanation of the payee that this note could not be made available in St. Louis because of the length of time, eight months, which it had to run, was probable in itself, and was calculated, not to create, but to disarm suspicion.

II. We do not wish to intimate a doubt that the plaintiff could have recovered if he had taken the note with full knowledge of the circumstances under which it was given. We think that it is important that the business community should not get the impression that we decide that there was any infirmity in the note, even in the hands of one taking it with notice. As this question is not before us, we are not to be understood as deciding it.

The judgment of the circuit court will be affirmed. It is so ordered. All the judges concur.

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B. W. SHACKLETT, Respondent, v. ADAM D. SCOTT, Appellant.

St. Louis Court of Appeals, November 9, 1886.

1. **HOMESTEAD — EXEMPTION — RIGHTS OF EXECUTION DEBTOR. — An officer levying on execution must give the execution debtor an opportunity to select property claimed as a homestead.**

2. **——— EXECUTIONS—LEVY.—A levy of execution, where the statutory requirements as to a homestead are not substantially complied with, should be quashed.**

APPEAL from the Scotland County Circuit Court, BEN. E. TURNER, Judge.

Reversed and remanded with directions.

McKEE & JAYNE, for the appellant: Property levied upon, being a homestead, was exempt from sale under this execution. Rev. Stat., sect. 2639; Sess. Acts, 1881, 140. The sheriff should have given the appellant an opportunity, after seizing the lands, to designate the part claimed as a homestead. Rev. Stat., sect. 2690. The appellant had a right to claim his exemptions at any time before sale. *State ex rel. v. Emmerson*, 74 Mo. 607.

A. H. SMITH, for the appellant.

SMOOT & PETTINGILL, for the respondent: The sheriff performed his whole duty in levying the execution. Rev. Stat., sects. 2347, 2690. The execution debtor may insist upon his privilege of claiming his exempt property, or he may waive it. *Osborne v. Schutt*, 67 Mo 712. It is the duty of the officer to apprise the debtor of his rights before making the levy. *Hombs v. Corbin*, 20 Mo. App. 497. He should summon appraisers and set off the homestead before proceeding with the

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levy. Thompson on Homesteads, sect. 640; *Vogler v. Montgomery*, 54 Mo. 577.

THOMPSON, J., delivered the opinion of the court.

This appeal is taken from an order overruling a motion to quash the levy of an execution upon a forty-acre tract of land belonging to one of the defendants in the execution. His motion proceeds on the ground that he is a resident householder and the head of a family; that the land is his homestead, and that he had no opportunity to select his homestead as allowed by section 2690, Revised Statutes. The testimony shows that the sheriff went with the plaintiff's attorney to the house of the appellant with an execution, notified him that he held it, advised him concerning his legal rights, and asked him what he was going to do about it; that the appellant replied that he was going to claim all that the law allowed him, and asked time to see his lawyer the next morning at Memphis; that the sheriff, after consulting with the plaintiff's attorney, who made no objection, said, "all right," and advised the appellant to do nothing until he had seen his lawyers; that the sheriff and the plaintiff's attorney thereupon drove away, and the appellant went to plowing in his field; that the sheriff and the plaintiff's attorney returned during the same afternoon, and that the sheriff immediately levied upon the land in question, without notifying the appellant or giving him any further opportunity to select his homestead; that the appellant the next day went to Memphis, and there drew up a formal claim of his homestead exemption, including this tract, and delivered it to the sheriff, who disallowed it. It also appeared from the sheriff's return that he made no levy except upon the forty acres in question, but that on the same day he summoned three disinterested freeholders, who, after being sworn, proceeded to appraise and set apart the appellant's homestead out of *other* land owned by him not included in the levy.

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I. It clearly appears from the testimony, including that of the sheriff himself, that the appellant was not allowed a fair opportunity of selecting his homestead, as allowed by the statutes. The act of the sheriff in returning and levying the same day without notifying the appellant, after impliedly consenting to postpone the matter till he could consult his attorneys the next day at Memphis, was as clear a violation of his right of selection as though the levy had been made originally without his notice. It is especially clear that the appellant has not waived his right of selection, or refused to make a selection, but, on the contrary, has attempted to do so and has been denied the right to do so. The sale of his homestead premises, under such circumstances, would be a plain deprivation of the right secured to him by the statutes.

II. Under the statute the jurisdiction of the sheriff to appoint freeholders to set apart the homestead, is predicated upon "a designation and choice," or "a refusal to designate or choose," of the execution debtor. In this case the evidence clearly shows that the attempted appraisement was not made, either after the appellant had made a designation and choice, or after any refusal to do so. It was, therefore, void.

III. The return shows that the lands set apart by the appraisers was no part of that levied upon, but that the sheriff levied on the forty-acre tract, and that the appraisers proceeded to set apart the homestead of the appellant out of *other* land owned by him in the neighborhood. Their proceeding was, for this reason, also, void. A setting apart by appraisers takes place under the statute "whenever an execution shall be *levied upon* the real estate of such housekeeper or head of family, of which such homestead may be a part, or upon such part of any homestead as may be in excess of the limitation of the value thereof created in section 2689," and when the other facts just recited exist. This confers no authority upon the appraisers to decide that the homestead of the

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execution debtor exists in some *other* tract of land than the one levied upon and to appraise it and set it apart. The setting apart can only be made *out of* the land levied upon.

The order appealed from will be reversed and the cause remanded with directions to the circuit court to enter an order quashing the levy. It is so ordered. All the judges concur.

R. F. McGuire, Respondent, v. The Missouri Pacific Railway Company, Appellant.

Kansas City Court of Appeals, November 22, 1886.

1. Killing of Stock—Place Where Injury Occurred—Duty to Fence.—In an action for damages, under section 809, Revised Statutes, for killing of stock, the evidence failed to show the point of entrance upon the railroad track, but it clearly appeared that the point where the stock was killed was such an one as the law requires to be fenced. In the absence of evidence to the contrary the inference is that the stock entered upon the track at that point. *Jantzen v. Railroad*, 83 Mo. 171.

2. Special Verdict—Sufficiency of Finding.—Where the court instructed the jury to return as a special verdict an answer to this question, "At what point did these sheep get on the railroad track?" etc., and the answer by special verdict was: "We, the jury, believe the sheep got on the said railroad track at a point," etc. *Held*, to be a sufficient finding and not the mere opinion of the jury. Adopting view of St. Louis court of appeals in *Brick Company v. Railroad*, 21 Mo. App. 648.

Appeal from Jasper Circuit Court, Hon. M. G. McGregor, Judge.

Affirmed.

The case is stated in the opinion.

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ADAMS & BOWLES, for the appellant.

I. The finding upon the issue presented by the defendant and submitted by the court to the jury, should have been direct and positive. *Morrow v. Commissioners*, 21 Kas. 484.

II. The court erred in refusing to require the jury to find specifically upon the issue submitted. *Railroad v. Perry*, 34 Kas. 483; *Bohler v. Ranch Co.*, 31 Kas. 502; *Morrow v. Commissioners*, *supra*.

III. Proof that there was no fence at point where the sheep entered upon track and were killed is not sufficient to support the judgment. *Harrington v. Railroad*, 71 Mo. 384; *Berry v. Railroad*, 65 Mo. 152. *Johnson v. Railroad*, 80 Mo. 620; *Peddicord v. Railroad*, 85 Mo. 160.

GREEN & PERKINS, and JAS. H. HARKLESS, for the respondent.

I. Where stock are found killed on the railroad track at a point where the company is required to fence, and there is no evidence where they got on the track, it will be presumed they got on the track where they were killed. *Jantzen v. Railroad*, 83 Mo. 171.

II. On the word "believe," examine *Johnson v. Dispatch Co.*, 2 Mo. App. 565; *Brick Co. v. Railroad*, 21 Mo. App. 648, as contained in the special verdict in this case.

ELLISON, J.—This action was begun before a justice of the peace to recover double damages under section 809, Revised Statutes, for killing thirty head of plaintiff's sheep and injuring others. Judgment was rendered by default before the magistrate, when defendant appealed to the circuit court of Jasper county, where, on trial, judgment was again rendered for plaintiff, defendant appealing to this court.

Among other instructions asked by defendant was the following, to-wit:

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"The court instructs the jury to return as a special verdict an answer to this question: At what point did these sheep get on the railroad track? and answer and return said special verdict, signed by your foreman, in addition to your general verdict." Under this instruction the jury, in addition to a general verdict, brought in a special verdict as follows: "We, the jury, believe the sheep got on said railroad track at a point," etc.

There are two objections against the action of the trial court, which have been brought specially to our attention. First, it is stated that, as the evidence fails to show at what point on the track the sheep strayed thereon, so that it might be seen whether it was a point at which the company was bound to fence, the judgment cannot be supported. The evidence does fail to show the point of entrance, but it clearly appears that the point where the sheep were killed was such an one as the law requires to be fenced. The facts in this case bring it fairly under that of *Jantzen v. Ry. Co.* (83 Mo. 171). It is there said that "There is no express statement in the testimony that the cow entered upon the track where she was killed. But the facts appear in evidence that her hair, and blood, and carcass were found on the track at a point which was not, but should have been fenced. In the absence of evidence to the contrary, the natural inference is that she entered upon the track at that point, not that she entered upon the track at a highway crossing and jumped over fences and cattle guards to get there."

The second objection is that the statement in the special verdict that we "believe" the sheep got on the track, etc., is not a finding, being the mere opinion of the jury. This identical question was before the St. Louis court of appeals in the case of *E. & H. Brick Company v. Railway Company* (21 Mo. App. 648), and was ruled against the defendant. It was there stated that "the *belief* of the jury, derived from the evidence, is the basis of every verdict, and is so generally made

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to appear in the form of the instruction: 'If you believe from the evidence,'" etc.

We are inclined to adopt this view. The judgment is, therefore, with the concurrence of the other judges, affirmed.

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CLARA HARRIS, Respondent, v. THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, November 22, 1886.

1. PRACTICE — MOTION FOR NEW TRIAL ERRONEOUSLY ENTITLED—CASE ADJUDGED.—The motion for new trial, in this case, was, by mistake, endorsed with an erroneous title. *Held*, that said motion for new trial should be treated as having been filed by the proper title of this case in the circuit court.

2. JURISDICTION—TOWNSHIP OF JUSTICE OF PEACE.—Where the township must be proved in which the injury occurred, the jury are not at liberty to infer that the locality of the injury—not shown to be in such township—was a place in said township. *Backenstoe v. Railroad*, 86 Mo. 492.

APPEAL from Schuyler Circuit Court, HON. ANDREW ELLISON, Judge.

Reversed and remanded.

Statement of case by the court.

This was an action instituted before a justice of the peace of Liberty township, Schuyler county, for the recovery of damages caused by the killing of a horse. From a judgment rendered in the justice's court in favor of the plaintiff, the defendant took an appeal to the circuit court.

In the circuit court the case was tried *de novo*. There was no evidence on the latter trial that the horse was killed in the township of the justice. The defendant

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asked an instruction in the nature of a demurrer to the evidence, which was refused by the court. From a judgment again rendered in favor of the plaintiff the defendant has appealed to this court.

The transcript, originally filed in this court, recites in the bill of exceptions that a motion for new trial was filed in this case in the circuit court in proper time, and sets out therein what purports to be a copy of said motion. On the motion of the plaintiff, suggesting a diminution of the record and asking for a writ of *certiorari*, directing the clerk of the circuit court to make out and transmit to this court a full, true and complete transcript of the proceedings had in this case in said circuit court, said writ was issued. In obedience thereto, the said clerk transmitted to this court a transcript of the record reciting in the bill of exceptions that the defendant had filed a motion for new trial in proper time, but stating that there was no such motion on file among the papers in this case in his office, nor had there ever been.

On the application of the defendant another writ of *certiorari* was issued by the order of this court directing the clerk of the circuit court to transmit to this court a full and complete transcript of the proceedings had in this case, and to transmit with such transcript the original motion for new trial which had been set out by him in the bill of exceptions as contained in the transcript of the record originally filed in this court. All of which has been done by the said clerk as ordered.

It appears that the original motion for new trial was entitled on its face, "Clara Harris, Plaintiff, v. Wabash, St. Louis & Pacific Railway Company, Defendant"; and that the said motion was similarly entitled on its back.

The affidavit of Mr. Edward Higbee, who was one of the attorneys for defendant on the trial of this case in the circuit court has been filed in this court. Mr. Higbee states therein that he was such attorney on said trial; that the said motion for new trial, viz: the original

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motion for new trial transmitted by the clerk of the circuit court, was the motion filed in this case, to which reference was made, as having been filed, in all three of the transcripts of the record filed in this court; that, by mistake, it was entitled as it was entitled, and that there has never been in the said circuit court a case entitled as was the motion for new trial.

The motion for new trial is endorsed upon its back by the clerk as having been filed on May 8, 1884, the day on which all three of the transcripts recite a motion for new trial was filed in this case.

No affidavit has been filed by the plaintiff contradicting the statements made by Mr. Higbee.

All three of the transcripts show that the motion for new trial was overruled.

GEO. S. GROVER, for the appellant.

I. It was not proved that the defendant owned and operated the railroad in question.

II. There was no proof that the animal was killed in Liberty or any other township in Schuyler county, Missouri. *Mitchell v. Railroad*, 82 Mo. 106; *Backenstoe v. Railroad*, 86 Mo. 492.

III. Upon all the evidence, the court should have instructed the jury to find for the defendant. *Fetterling v. Railroad*, 79 Mo. 604; *Heaston v. Railroad*, 18 Mo. App. 403.

SHELTON & DYSART, for the respondent.

I. Both the record proper and bill of exceptions fail to show any motion for new trial. *Ex. Nat'l Bk. v. Allen*, 68 Mo. 474. *State ex rel. Wakefield v. Richardson*, 77 Mo. 589; *Ballenger v. Carrier*, 79 Mo. 318; *McKee v. Calvert*, 80 Mo. 348; *Robinson v. Hood*, 67 Mo. 660.

II. Appellant makes no assignment of errors, as arising on the face of the record. See Rule 17 of this court.

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III. The petition in this case states a cause of action under section 809, Revised Statutes. *Cunningham v. Railroad*, 70 Mo. 202; *Luckie v. Railroad*, 67 Mo. 243; *Sloan v. Railroad*, 74 Mo. 47; *Hudgins v. Railroad*, 79 Mo. 418; *Fields v. Railroad*, 80 Mo. 203; *Busby v. Railroad*, 81 Mo. 43; *Thomas v. Railroad*, 82 Mo. 538.

IV. The judgment was for the right party and should be affirmed.

I.

HALL, J.—It is morally certain, under the facts stated, that the motion for new trial, transmitted by the clerk of the circuit court in obedience to our order made upon him, was by mistake endorsed with an erroneous title, and was filed by the defendant in the circuit court in this case. We are convinced that such are the facts. Such being the case, we are of the opinion, and so hold, that said motion for new trial should be treated as having been filed by the proper title of this case in the circuit court

II.

It was necessary for the plaintiff to prove that the horse was killed in the township of the justice of the peace. From the facts proved in this case as to the place at which the horse was killed the jury were not at liberty to infer that the horse was killed in such township. *Backenstoe v. Railroad Co.*, 86 Mo. 492. For this reason the judgment must be reversed. But, inasmuch as the failure to prove such fact was doubtless a mere oversight, and such proof can be supplied on a new trial, the cause will be remanded for that purpose.

It is so ordered. Ellison, J., concurs; Philips, P. J., absent.

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GABRIEL FEURT, EXECUTOR, ETC., Appellant, v. AMBROSE BROWN ET AL., Respondents.

Kansas City Court of Appeals, November 22, 1886.

1. PRACTICE—DEMURRER TO EVIDENCE—DUTY DEVOLVING ON COURT IN DETERMINING.—In passing on a demurrer to the evidence the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor. And the court is not at liberty to make inferences of fact in *favor of defendant*, to *countervail* or overthrow either presumptions of law or inferences of fact in favor of the plaintiff, as this would be usurping the province of the jury.

2. PARTNERSHIP—AUTHORITY OF MEMBER AS TO SIGNING OF NOTE, ETC. A member of a trading partnership is authorized to sign the firm name to a note, in the usual course of business. And the presumption is that all paper upon which the signature of a trading firm has been put by a partner, is the paper and bears the signature of the partnership.

3. ——— SETTLEMENT OF ACCOUNTS—ACTION BY PARTNER.—When there has not been a settlement of accounts and a balance ascertained, one partner cannot maintain *assumpsit* against another, but if only one item of the partnership remains to be liquidated, such action will lie.

APPEAL from Gentry Circuit Court, HON. CHAS. H. S. GOODMAN, Judge.

Reversed and remanded.

The case and facts are stated in the opinion.

KARNES & KRAUTHOFF, with C. H. MANSUR, for the appellant.

I. Only one item remaining unadjusted between them, one partner may sue his co-partners *at law* therefor. *Buckner v. Rees*, 34 Mo. 357; *Russell v. Grimes*, 46 Mo. 410; *Bethel v. Rankin*, 57 Mo. 466. Such an action also lies on the express promise evidenced by the

note sued on. *Crate v. Bininger*, 45 N. Y. 545; *Venning v. Luckie*, 13 East. 7. And the general presumption of law, that all paper upon which the signature of the firm has been put by a partner is firm paper given in the usual course of business, is applicable although the firm name was signed by the partner who is named as payee of the paper in question. 1 Parsons on Bills and Notes, 128; Parsons on Partnership [2 Ed.] *202; 1 Daniel on Neg. Insts., sect. 369; *Hickman v. Kunkle*, 27 Mo. 401. Want of consideration or fraud will not be *presumed*, and were not *proved* in this case.

II. The court erred in holding that there was no evidence warranting a recovery by plaintiff. The note standing unimpeached was such evidence. The weight of the other evidence and the inferences to be drawn from it, are not to be decided as questions of law.

CRITTENDEN, McDOUGAL & STILES, for the respondents.

I. The case being tried by the court as a jury, its finding will stand the same as a verdict. *Conrad v. Bett*, 22 Mo. 166; *Beck v. Pollard*, 55 Mo. 26; *Moore v. Davis*, 51 Mo. 233. The finding will not be set aside if there is any evidence to sustain it. *Blumenthal v. Torini*, 40 Mo. 159; *The State v. Cook*, 58 Mo. 546; *Davis v. Cox*, 59 Mo. 125; *Smith v. Crews*, 2 Mo. App. 269.

II. The verdict or finding will not be disturbed unless the preponderance of evidence is so overwhelming as to indicate passion, prejudice, or misconduct on the part of the jury or court. *Mulliken v. Grier*, 5 Mo. 489; *Campbell v. Hood*, 6 Mo. 211; *Robbins v. Insurance Co.*, 12 Mo. 380; *Baker v. Stonebraker*, 36 Mo. 338. Where there is any conflict in the evidence, *or any reason for a substantial doubt*, the court will not disturb the finding or verdict. *Garvin v. Williams*, 50 Mo. 206; *Hearne v. Keith*, 63 Mo. 84.

III. The error in the instruction complained of is

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merely technical, and could not materially affect the merits of the action. If the finding was justified on the whole record, there is no ground for reversal. Rev. Stat., sect. 3775; *Walter v. Cathcart*, 18 Mo. 256; *The State v. Vaughan*, 26 Mo. 29; *Patten v. Weightman*, 51 Mo. 432. And so where the finding was for the right party. *Rowell v. St. Louis*, 50 Mo. 92; *Barr v. Armstrong*, 56 Mo. 577; *Nelson v. Foster*, 66 Mo. 381. Or where an instruction was refused, if the result would have been the same. *Insurance Co. v. Gairzhorn*, 2 Mo. App. 205.

IV. There having been no settlement with reference to this note, this suit is not maintainable. *Springer v. Cahill*, 10 Mo. 641; *McKnight v. McCutchen*, 27 Mo. 436; *Smith v. Smith*, 33 Mo. 557.

ELLISON, J.—This is an action on a promissory note. The petition alleges the death of Benjamin G. Kimball, the payee, and the appointment of plaintiff as his executor. It also states that Kimball and these defendants were partners doing business as wholesale lumber dealers at various points in Northwest Missouri. That the firm executed the note to said Kimball, a member thereof, by which they promised to pay him six months after date, etc. It further alleges a settlement of all the partnership affairs, with the exception of the note sued on, which was, by mutual agreement, left unadjusted. The prayer was for judgment for two-thirds of the note and interest. The answer denied a settlement of the partnership affairs and pleaded a want of consideration for the note.

On the trial which was had before the court without the intervention of a jury, the partnership was admitted, and it was also admitted that during the existence of the partnership, Kimball was its cashier and treasurer, that he kept the cash books and accounts and looked after the financial affairs of the firm. On these admissions plaintiff introduced a witness who testified to a full and satisfactory settlement of all the partnership affairs

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save this note, which was omitted by agreement of the parties.

The witness further testified he found another note, the duplicate of the one in this suit, except it was dated a few days earlier and was payable to Kimball, as guardian of the Ellis heirs, the two notes being in Kimball's handwriting. That after diligent search he could not find where the proceeds of the note in suit went into the business of the firm, yet he did find where three items or debts owed by the firm, amounting to about five hundred dollars, had been paid by Kimball, and for which Kimball had no corresponding credit on the partnership books. The plaintiff then read in evidence the note in suit and rested. Defendants, in addition to what was shown by plaintiff, only offered evidence showing the note in suit and the signature thereto, was all in the handwriting of Kimball.

On this evidence the court gave the following instruction, to-wit: "Upon the pleadings and proof in this case, offered on the part of plaintiff, no case is made *prima facie* entitling the plaintiff to recover, hence the finding and judgment should be for defendants."

In considering this instruction, the words *prima facie* may be omitted, and the instruction taken as a demurrer to plaintiff's case, for it amounts to that as it stands. The question then is, does the law, as applied to the testimony on plaintiff's behalf, disentitle him to a consideration of the facts as he has presented them?

We do not so consider it. In passing on a demurrer to the evidence the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor. *Fisher v. Railroad*, *ante*, page 201.

And "the court is not at liberty, in passing on such demurrer, to make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions

of law or inferences of fact in favor of the plaintiff; that would clearly be usurping the province of the jury." *Bueschimg v. Gas Light Co.*, 73 Mo. 219. Applying this rule to the case before us, it is clear the instruction should not have been given.

Plaintiff's evidence discloses this to have been a mercantile concern—a trading partnership—and the note to have been signed by a member of such character of partnership. He had authority to do this. The case of *Hickman v. Kunkle* (27 Mo. 401), on this subject, as applicable to this sort of partnership, has not been limited as an authority in the case of *Deardorf v. Thacher* (78 Mo. 128). On the contrary, the latter case upholds the doctrine we here assert. It is objected, however, that discredit sufficient to change the *onus* of proof, was cast on this note from the fact of it having been executed by a member of the firm, who is the payee. This, I think, should not alter the presumption that all paper upon which the signature of a trading firm has been put by a partner, is the paper and bears the signature of the partnership. Parsons on Partnership, 211 [2 Ed]; *Haldeman & Grubb v. Bank of Middletown*, 28 Pa. St. 440. "The law does not require us to suspect that such paper is got up by one partner in order to defraud his copartners, much less does it infer that such was the fact." *Ihmsen v. Negley*, 25 Pa. St. 297.

It is urged that the trial being before the court, its conclusion on the facts should be considered the same as the verdict of a jury, and should not be disturbed by an appellate tribunal. We grant this, but the difficulty is, that here the court does not submit the case hypothetically—the facts are not submitted to be passed on—the case is peremptorily taken from the triers of the facts.

II. It is submitted, however, that plaintiff cannot recover in any event, as Kimball and defendants were partners, and the item of this note had not been settled or adjusted between them. It is true that, when there has not been a settlement of accounts and a balance

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ascertained, one partner cannot maintain *assumpsit* against another, but if only one item of the partnership remains to be liquidated, such action will lie. *McKnight v. McCutchen*, 27 Mo. 436; *Scott v. Caruth*, 50 Mo. 120; *Russell v. Grimes*, 46 Mo. 410; *Buckner v. Reis*, 34 Mo. 357. It is undisputed in this case that all the partnership affairs were settled save the item in suit, from which it results, under the authorities cited, that the action is maintainable in its present form. There are no equities to adjust nor accounting to take, as would be the case had there been no settlement; there is but the single item, and I see no reason why it could not be settled between the parties by a jury, in an ordinary action at law.

The judgment is reversed and the cause remanded. All concur.

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NANCY MURPHY, Plaintiff in Error, v. JAMES M. DEFRANCE ET AL., Defendants in Error.

Kansas City Court of Appeals, November 22, 1886.

1. SUIT TO QUIET TITLE UNDER THE STATUTE — PROCEEDINGS UNDER. In a proceeding under the statute to quiet title (sects. 3562-3564, Rev. Stat.) where the answer was a general denial, the issue of the plaintiff's possession was the only issue under the pleadings. Where the defendant claims title to the land the statute provides (sect. 3563, Rev. Stat.) that "he shall by answer show cause why he should not be required to bring an action and try such title," and unless this is done the existence of such cause is not in issue.

PRACTICE — JUDGMENT — PLEADING SUBSEQUENTLY WITHOUT SETTING ASIDE. — When the court, in this case, rendered judgment, requiring defendants to bring suit to try their title; and *afterwards*, *without setting aside* this judgment, permitted defendants to file a "supplemental answer," the judgment *rendered* was still alive after said answer had been filed, and there was nothing before the court. Notwithstanding the filing of said answer, the judgment was still conclusive, and a *subsequent* judgment on the "answer" was error.

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APPEAL from Adair Circuit Court HON. ANDREW ELLISON, Judge.

Judgment rendered on "supplemental answer" *reversed.* Judgment originally entered *affirmed;* and all costs, including costs of appeal, adjudged against the defendants.

Statement of case by the court.

The petition in this case alleged that the plaintiff was in possession, as owner in fee-simple, of sixteen acres of land described in the petition to which the defendants made some claim, and asked that the defendants be summoned to show cause why they should not bring an action to try their title. The preliminary order was issued, and the defendants filed their answer, in which they denied the allegations of the petition except that they claimed title to the said land.

A trial was had, with a jury, of the issue thus made. The court instructed the jury that the only issue before them was as to the possession by the plaintiff of the land described in the petition; the court refused, though asked by the defendants so to do, to instruct the jury to find the character of the plaintiff's possession, whether said possession was that of a doweress or owner. The jury returned a verdict finding that the plaintiff had possession of five and one-half acres of the said land, and had not possession of the balance of it. The court rendered judgment, as is shown by the abstract of the record filed by the defendants, requiring the defendants to bring suit to try their title to the said five and one-half acres of the land.

The verdict was returned and the judgment was rendered on the fourteenth day of April, 1885. On the twenty first day of April, 1885, the defendants filed a motion to quash the verdict of the jury, which motion the court overruled. On the last mentioned day the

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court permitted the defendants, against the plaintiff's objections, to file a supplemental answer. The supplemental answer alleged that the plaintiff held possession of the five and one-half acres of land as her dower, and that the defendants owned the remainder, which interest only did they claim. The said answer also pleaded a former judgment of the circuit court, setting apart the five and one-half acres of land as the plaintiff's dower, and decreeing the title to the balance of the land to be in the defendants, and ordering that the defendants be placed in the possession of said balance of the land, as *res adjudicata.* The said answer further alleged that the defendants were, and, ever since the former judgment aforesaid, had been in possession of the land, except the said five and one-half acres.

The objections made by the plaintiff to the filing of the supplemental answer were as follows:

"1. Out of time; can't be done after verdict.

"2. It does not attempt to conform its allegations to the proofs in the case, and sets up a special and different defence from the general denial.

"3. Because plaintiff is entitled to judgment on the supplemental answer as to the five and one-half acres the jury found her in possession of.

"4. Because the application to file answer is not made by motion."

It does not appear that the court set aside the judgment originally rendered. But upon the filing of the supplemental answer and upon the same day the court rendered a new judgment by which it was adjudged that the plaintiff's petition be dismissed and that the plaintiff recover from the defendants the costs expended by her.

The defendants objected to so much of the latter judgment as adjudged the costs against them, and filed their motion in arrest making such objection.

The plaintiff in due time filed her motion in arrest, which set up the following grounds in support thereof:

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"1. On record it is erroneous.

"2. Not responsive to the pleadings.

"3. The court erred in permitting defendants to file supplemental answer after verdict.

"4. Because it is not a judgment on the verdict in the cause.

"5. Because supplemental answer cannot be filed after verdict to change the issues in the cause."

Both parties have brought the case here on cross appeals.

O. D. JONES, for the plaintiff in error, who is also appellant.

I. There is no law in this state to warrant the filing of a "supplemental answer" after submission, trial and verdict, upon the suggestion of the court or otherwise. The case is not one to try title, and cannot be in this action.

II. The petition in this case is not a bill, and this is not the time to settle the title. It is only a proceeding *preliminary* to such a suit. *Ruthford v. Ullman*, 42 Mo. 216. Plaintiff *being in possession* and claiming the fee can compel one who claims the fee *adverse to her* to bring suit to try his title. *Benoist v. Murrin*, 47 Mo. 537.

III. Motion for new trial must be filed within four days after trial, or appeal will not lie. *Richmond v. Pogue*, 36 Mo. 313; *Bishop v. Ranson*, 39 Mo. 416; *Moran v. January*, 52 Mo. 523. This ruling was never changed.

IV. Defendants appeared, did not disclaim title, "to show cause why they should not be required to bring action," denied that plaintiff was in possession of any of the land. They went to trial on that issue and lost. The only thing left for the court to do, under the statute, was "to make such judgment or order respecting the bringing and prosecution of an action as may seem equitable and just."

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JAMES M. DEFRANCE, for the defendants in error, also appellants.

I. Any evidence that went to prove that at the time the suit was brought no cause of action existed, is competent under a general denial; and the supplemental answer was unnecessary, and was not new matter, because the proof of the dower interest of the plaintiff had already been given in the case, and the court was possessed of it.

II. A party can't compel another to litigate his claim to a future interest. *Webb v. Donaldson*, 60 Mo. 394.

III. Any proof may be made, under a general denial, that goes to show plaintiff has no cause of action. *M'f'g Co. v. Tinsley*, 75 Mo. 458; *Young v. Glasscock*, 79 Mo. 577.

IV. To show plaintiff's possession as doweress (it having been *proved* by defendants) was only an indirect way of negativing her petition, and would not be new matter. *State to use v. Williams*, 48 Mo. 212.

HALL, J.—The defendants have no reason to complain of the action of the trial court.

The original answer, by means of the general denial, put the possession of the plaintiff in issue. But that issue was the only issue under the pleadings as they then were. The defendants did not *affirmatively* claim title to the land in question; they simply in their answer did not deny that they claimed title. In an action of this kind, under our statute, where defendant claims title to the land "he shall by answer show cause why he should not be required to bring an action and try such title." Rev. Stat., sect. 3563.

Not having shown such cause by answer the defendants were not in a position to show such cause by evidence. The existence of such cause was not in issue. Conceding, then, for the purposes of the defendants' ap-

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peal, that the court properly permitted the defendants to file the supplemental answer, disclaiming any immediate interest in that portion of the land in the possession of the plaintiff, we think that the court very justly adjudged the costs in the case against the defendants. The costs were principally made because the original answer contained no such disclaimer. It was just to require the defendants to pay the costs in order to receive the benefit of the disclaimer. Certainly the court did not abuse the discretion belonging to it in matters of costs, in adjudging against the defendants the costs, most of which were incurred by their conduct.

The serious question arises on the plaintiff's appeal, in relation to the action of the court in permitting the defendants to file the supplemental answer after final judgment, and in rendering judgment upon said answer, dismissing the petition.

By section 3570, Revised Statutes, it is provided that in certain cases, after final judgment, the pleadings may be amended "in affirmance of such judgment." The filing of the supplemental answer after the rendition of the original judgment was not, however, authorized by said statute, because said answer was not filed in affirmance of such judgment. The supplemental answer was filed in order to obtain a judgment different from the judgment which had been already rendered.

The record does not show that the court set aside the judgment first rendered. The court, of its own motion, could without doubt have set aside the judgment during the term at which it was rendered. The general rule is, "that the power of the court over its judgments, during the entire term at which they were rendered, is unlimited." But this rule has certain qualifications, as explained in *Nelson v. Ghiselin* (18 Mo. App. 665). And a judgment, during the term at which it is rendered. "may be altered, revised or revoked, as well as amended in respect to clerical errors and matters of form." Freeman on Judgments, sect. 69.

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Had the court set aside the original judgment, it might have properly permitted the defendants to file the supplemental answer, and the case would have then stood as if there had been no trial or judgment.

But, inasmuch as the court did not set aside the original judgment, the question is, did the filing of the supplemental answer have the effect to set aside the judgment, and was the filing of such answer permissible on that ground? That question is the question in this case, because, unless the filing of the said answer had such effect, said filing was not permissible, for the reason that as long as the judgment stood unrevoked the pleadings could have been amended for the purpose only of affirming the judgment. We do not see how such effect can be given to the filing of such answer. The judgment, therefore, rendered was still alive after said answer had been filed, and there was nothing before the court notwithstanding the filing of said answer.

The judgment was still conclusive. The filing of the answer was unauthorized and improper. And so, too, was the judgment rendered upon the answer, dismissing the plaintiff's petition.

It has been seen that the original judgment was the only judgment which could have been properly rendered under the pleadings as they then were, and the finding made upon the only fact in issue.

And it has just been said that it was error for the court, while that judgment stood unrevoked, to permit the defendants to file the supplemental answer, and to render the judgment thereon, dismissing the plaintiff's petition.

The judgment rendered on said answer is, therefore, reversed, and the judgment originally entered by the circuit court is affirmed; and all the costs in this case, including the costs of the appeal, are adjudged against the defendants. Ellison, J., concurs; Philips, P. J., not sitting.

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VINCENT CONNOR, Appellant, v. W. S. POPE, Respondent.

Kansas City Court of Appeals, November 22, 1886.

PRACTICE—APPELLATE COURTS—EFFECT OF REVERSING AND REMANDING.—Where a cause is reversed and remanded by the appellate court, with directions as to the further proceedings of the trial court, "it is out of the power of the lower court to open the cause and have a new trial." ***Chouteau v. Allen,*** **74 Mo. 56. It must, and can only, proceed to carry into execution the mandate of the superior court.**

APPEAL from Miller Circuit Court, HON. E. L. EDWARDS, Judge.

Affirmed.

The case is stated in the opinion.

G. T. WHITE, with MOORE & WILLIAMS, for the appellant.

I. We had the right to make the showing which was made as to the return of the officer. It comes under the head of what is termed a writ of *error coram nobis*. *Foney v. State*, 11 Mo. 85; *Callaway v. Nefering*, 1 Mo. 223; *Conway v. Ferry*, 26 Kansas, 472; *Powell v. Gott*, 13 Mo. 460; *Pickett v. Legwood*, 7 Peters (U. S.) 140; *Exparte James Roy*, 57 Mo. 231; *Nelson v. Brown*, 23 Mo. 20; 2 Tidd's Pract. 1056; 3 Pomeroy's Equity, sect 1365; *Phelan v. Engelmann*, 86 Mo. 551; *Davis v. Harper*, 6 Ohio, 573.

EDWIN SILVER and W. S. POPE for the respondent

I. Where the supreme court remands a case with special directions as to the judgment to be entered, the lower court has no power in the premises, but to enter judgment in accordance with the mandate; all other

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steps are *coram non judice*, and void. *State ex rel. Dixon v. Givan*, 75 Mo. 517; *Chouteau v. Allen*, 74 Mo. 56. This court occupies the same position, in the premises, as the supreme court would. Laws of Mo. (1885) p. 115, sect. 7.

II. The lower court should have discharged the garnishee in the first instance, and of its own motion. This is not a case for writ of *error coram nobis*, but an attempted amendment of a sheriff's return. That court *without authority* permitted the amendment of the sheriff's return. Appellant has nothing to complain of and the judgment discharging the garnishee should be affirmed.

PHILIPS, P. J.—This case was once before in this court on appeal, and is reported in 18 Mo. App. 86. From that opinion it will appear that the garnishment proceeding failed because the sheriff's return did not show that the proper service of notice was made on the garnishee to give the court jurisdiction over the subject matter, to authorize the judgment of the circuit court against the garnishee.

For this error the judgment was reversed and the cause remanded, with special directions to the trial court to enter judgment discharging the garnishee. This judgment this court might have entered up here. (Rev. Stat., sect. 3776.) But as the garnishee is entitled on his discharge, in such instance, to have his costs and attorney's fee for answering and appearing taxed, we remand such cases to the trial court, which is better qualified to make such assessment than this court.

On the return of the mandate from this court the garnishee asked the circuit court to enter judgment conformably therewith. The plaintiff now contends, in his *statement*, that the sheriff's return in fact did make the proper service on the garnishee, but that the original papers in the case were lost, and on order of the trial court they were supplied, and so came to this court,

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with the necessary fact of proper service omitted from the record. So when the garnishee asked the court to enter the judgment as directed by this court the plaintiff filed motion therein suggesting the foregoing fact, and asking the court to allow the sheriff to make an amended return showing the proper service, and then to proceed to re-try the case *de novo*. The plaintiff's statement alleges that the court so far sustained such motion as to allow the amended return to be made, but refused to proceed further, and entered up judgment discharging the garnishee. The abstract of record filed herein by plaintiff, fails to contain, or set out such alleged amended return of the sheriff. Under the rules of this court, and its repeated decisions, we cannot recognize such facts as contained in the record when not furnished with an abstract thereof. The statement is not the abstract of the record. From the judgment of the circuit court the plaintiff prosecutes this appeal.

It would be a remarkable ruling on the part of this court, after reversing the judgment and remanding the case with special directions to the lower court to enter a particular judgment, to again reverse that court for doing precisely what we directed it to do.

Where a cause is reversed and remanded by the appellate court, with directions as to the further proceedings of the trial court, "it is out of the power of the lower court to open the cause and have a new trial." *Chouteau v. Allen*, 74 Mo 56. It must, and can only, proceed to carry into execution the mandate of the superior court. *State ex rel. Dixon v. Givan*, 75 Mo. 516. Any other rule would break down all authority of and respect for the appellate courts. As said by Sherwood, J., *supra:* "This court would frequently be shorn of its lawful and customary authority, if a plaintiff, successful in the lower court, and unsuccessful here, could thus defeat our legitimate demands."

Counsel for appellant cite cases from Illinois to support their contention. We find no authority in the

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decisions of that court giving any countenance to such a proceeding as was attempted by plaintiff in this case. Reference is made, for instance, to a case reported in 29 Ill. 202-3.

We find nothing in that case bearing in the remotest degree on this question. On the contrary, in this same volume of the Illinois Supreme Court decisions, 303, *Chickering et. al. v. Failes et al.*, the court say: "Where the decree is affirmed, in all its parts, the controversy is at an end. In such a case, the circuit court has no power to allow amendments of the pleadings, or to alter or change the decree. It can only proceed to have it enforced, according to its terms and conditions. Where the decree is reversed, and the cause is remanded with specific directions, the court below has no discretion, but must pursue the mandate of the appellate court. If such instructions were not observed it would be error, for which the second decree would be reversed on appeal." This rule is again recognized in *Wadhams v. Gay*, 83 Ill. 250.

In *Duffitt v. Crozier*, Supreme Court of Kansas, reported in 17 Central Law Journal, 233, it is held that after a reversal, with special mandate to enter judgment, it is the duty of the trial court to obey; but it may hear new and additional facts in the further proceedings; but it is not to be re-tried upon the old facts, nor upon facts which ought to have been, and might have been, presented at the trial. Without following this case to the length indicated by the opinion therein, it seems to me that even the rule there announced would preclude the plaintiff in this case. There is nothing in this record to indicate when the fact of the omission in the sheriff's original return first came to the knowledge of the plaintiff. Nothing to show that he did not know of it at the first trial. It certainly was a fact which he ought to have known, and which he at least might have known by the exercise of ordinary diligence. The validity of this return was the sole question discussed

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by counsel on the former appeal. Plaintiff's counsel then knew what the return was, and sought by argument and authority to satisfy this court that the return was in form and sufficient to warrant the judgment of the circuit court. Not until the case was lost in this court, and the mandate was sent down, did it seem to occur to the plaintiff to have the sheriff amend his return. Such proceedings should receive little favor or encouragement from the courts. Such amended returns should be closely scanned by the trial courts before allowing them. Such facts, resting so long *in pais*, in the mere memory of officers, place defendants at a great disadvantage to disprove the truth of such amended statements. And after a cause has been sharply litigated on the first return, and gone to final judgment on the admission of record in the appellate court that it presents the truth, even a court of chancery, on proper petition to reopen the case by vacating the judgment, should scan such action with a distrustful eye.

It is difficult to see when there would be a finality to litigation in such a case as this, if, after the cause has been tried and gone to judgment, on the verity of an officer's return, the unsuccessful party be at liberty, as contended for by appellant's counsel, to come in by motion, likened to the writ of *coram nobis*, against which there is no statute of limitation, as held by our supreme court (*Groner v. Smith*, 49 Mo. 324) and have that return amended and the cause retried on its merits.

The case of *State ex rel. Phelan v. Englemann* (86 Mo. 551), relied on by counsel, is no authority for this proceeding. That was a proceeding by mandamus to compel the lower court to disregard a proceeding by injunction to restrain the operation of a judgment entered by the trial court pursuant to the mandate of the supreme court. The court held that notwithstanding the judgment was thus entered, it stood as any other judgment of the court, which a court of chancery, in the exercise of its most ancient equity jurisdiction, might vacate upon a

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showing that the judgment itself had been fraudulently obtained by the successful party.

Even if it were conceded that the mere motion employed in this case could perform the function of a bill in equity, it wholly fails to appear from this record that the motion contained any allegations which would form the basis for a court of equity to set aside a judgment. It avers neither fraud, surprise, nor shows the exercise of the least vigilance or diligence on plaintiff's part on the former trial to discover the fact; nor does it disclose any concealment, artifice or trick of defendant, to prevent earlier discovery of the reputed fact. Courts of equity never encourage laches.

Our conclusion is that the circuit court did not err in obeying the mandate of this court. The other judges concurring, the judgment of the circuit court is affirmed.

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STATE OF MISSOURI, Defendant in Error, v. HENRY KIRSCHNER, Plaintiff in Error.

Kansas City Court of Appeals, November 22, 1886.

1. CRIMINAL LAW—PROSECUTION BY INFORMATION—REQUIREMENTS OF SECTION 1762, REVISED STATUTES.—Under section 1762, Revised Statutes, all informations are required to be verified by the oath of the prosecuting attorney, "or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person." *Held*, that a person convicted of grand larceny in 1872, and by the statutes *then* in force, was rendered incompetent to testify as a witness; is not rendered competent by the change made by the Revision of 1879, and is still incompetent.

2. ——— REMOVAL OF INCOMPETENCY OF WITNESS—PARDON, EFFECT OF.—The incompetency of a witness by reason of conviction of crime, could only be removed by a full pardon of the offence of which he was convicted. *Held*, that the paper in this case is not a pardon of the offence, and is not a pardon.

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ERROR to Cole Circuit Court, HON. E. L. EDWARDS, Judge.

Reversed and defendant discharged.

Statement of case by the court.

This was a prosecution by information of the prosecuting attorney, verified by the oath of one James Wilkerson, instituted in the circuit court against the defendant, in 1885.

James Wilkerson, in 1872, was convicted in the circuit court of Cole county of grand larceny, and was sentenced to imprisonment for two years in the penitentiary. Before the expiration of his sentence Wilkerson was granted by the governor of the state what is denominated a pardon, the material portion of which document is as follows:

"State of Missouri: To all who shall see these presents, greeting:

"Know ye that, by virtue of authority in me vested by law, and for good and sufficient reasons appearing, I, Silas Woodson, governor of the state of Missouri, do hereby release, discharge and forever set free James Wilkerson, who was, at the November term, A. D., eighteen hundred and seventy-two, by a judgment of the circuit court of Cole county, sentenced to imprisonment in the state penitentiary for the term of two years, for the crime of grand larceny, and I do hereby entitle the said James Wilkerson, to all the rights, privileges and immunities which by law attach and result from the operation of these presents. Conditioned, that the said James Wilkerson immediately upon his release, leave the county of Cole, and never return thereto voluntarily."

The court was asked to hold that the information was insufficient, because it was verified by the oath of

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Wilkerson, and he was incompetent to testify as a witness in the case. The court refused to so hold.

EDWARDS & DAVISON, for the plaintiff in error.

I. The court erred in not sustaining the motion to quash; the word "liquor" was left out in the averment as to license. This was not then a charge of violating the dramshop law.

II. The prosecuting witness in this case was incompetent to testify. The statute requires the affidavit to the information to be made by the prosecuting attorney, *or by the oath of some person competent to testify as a witness in the case.* Section 1762, Revised Statutes. It is admitted that the person who made the affidavit to the information in the case was convicted in 1872 of a felony which disqualified him as a witness, and it is admitted that he received from the governor a release from the penitentiary, under what is termed a three-fourths pardon. But this does not restore him to his competency as a witness. The affidavit, therefore, is not a legal one, and the judgment must be reversed, the information not having been verified as required by the statute, and the prisoner discharged. *State of Mo. v. Grant*, 79 Mo. 113.

No brief for the defendant in error.

HALL, J.—Under section 1762, Revised Statutes, the information had to be verified by the oath of the prosecuting attorney, "or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person." Unless Wilkerson was competent to testify in the case the information was not verified and was consequently insufficient.

The question, then, is, was Wilkerson a competent witness? Wilkerson was convicted of grand larceny in 1872, and by the statutes then in force was rendered incompetent to testify as a witness. The change made in

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the statutes by the revision of 1879 did not have the effect to remove Wilkerson's incompetency. *State v. Grant*, 79 Mo. 113.

Wilkerson was, then, incompetent to testify as a witness in the case, unless the so-called pardon issued by the governor of the state, removed his incompetency. Wilkerson's incompetency as a witness could only be removed by a full pardon of the offence of which he was convicted. *State v. Grant, supra*. The paper, called a pardon in this case, is not a pardon of the offence of which Wilkerson was convicted. The paper does not purport to be a pardon of such offence. The paper only releases and discharges Wilkerson from the penitentiary; the offence remains unpardoned.

As long as the offence remains unpardoned Wilkerson's incompetency as a witness continues. *State v. Grant, supra*, and authorities cited on page 127.

Not being a pardon the paper could not have removed Wilkerson's incompetency as a witness, but it does not purport to removed such incompetency. After discharging and releasing Wilkerson from the penitentiary, it simply, in addition thereto, entitles him to all the rights, privileges and immunities which by law attach and result therefrom, one of which rights, privileges, and immunities is not to testify as a witness.

Wilkerson was incompetent to testify as a witness in this case. The information was, therefore, not verified and was insufficient.

The judgment is reversed and the defendant is discharged. Ellison, J., concurs; Philips, P. J., not sitting.

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PATRICK NOLON, Respondent, v. THE CHICAGO & ALTON RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, November 22, 1886.

1. CONTRACT—TENANT—NOTICE.—A tenant of a land owner is not bound by the agreement of the owner, unless he had notice of its existence.

2. NEGLIGENCE—STOCK RUNNING AT LARGE.—It is not contributory negligence, in this state, to permit stock to go at large in the vicinity of a railroad.

APPEAL from Moberly Court of Common Pleas, HON. G. H. BURCKHARTT, Judge.

Affirmed.

The case and facts stated in the opinion.

MACFARLANE & TRIMBLE, for the appellant.

I. Defendant was not liable to plaintiff, under section 809, Revised Statutes, for the loss of his mule. Fences are required for the benefit and protection of the adjacent land owner alone. *Berry v. Railroad*, 65 Mo. 172; *Harrington v. Railroad*, 71 Mo. 384; *Peddicord v. Railroad*, 85 Mo. 160.

II. The land owner may waive the right, and it will be a defence to a suit for damages under section 809, Revised Statutes. *Thomas v. Railroad*, 82 Mo. 541; *Ellis v. Railroad*, 48 Mo. 233. A *tenant* of the proprietor occupying the land with notice of the agreement, would in like manner be bound by the waiver of his landlord. *Thomas v. Railroad*, *supra; Railroad v. Washburn*, 97 Ill. 253; *Warren v. Railroad*, 41 Iowa, 484. Knowledge of such facts as would put a reasonably prudent man on such inquiry as, if followed

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up, would lead to the knowledge of the agreement, is sufficient notice. This information plaintiff had. *Major v. Buckley*, 51 Mo. 227; *Meier v. Blume*, 80 Mo. 184.

III. Plaintiff was guilty of such contributory negligence as should defeat a recovery. His negligence was wilful. *Doyle v. Railroad*, 21 Mo. App. 416.

IV. The statute (sect. 809) did not apply to the road at the place plaintiff's mule got upon the track. Railroads are public highways. Const. Mo., art. 12, sect. 13; Rev. Stat., sect. 821. The statute does not apply in case fencing would interfere with the business of the public, or the corporation, as at public crossings, depots, etc. The reason is equally obvious why it should not apply here. Cooley Const. Lim., 578; *Morris v. Railroad*, 58 Mo. 78.

W. A. Martin, for the respondent.

I. There is no claim of actual notice, but only of constructive notice. Even this is not shown. Besides, the positive requirement of the statute is to fence. Rev. Stat., sect. 809. And the alleged *agreement* is not satisfactorily proved.

II. The question of contributory negligence has nothing to support it in this case. The evidence nowhere shows any necessity for breaking the fence along the old road in order to grade the new; in fact there is no evidence on that question. Plaintiff had no notice of the verbal agreement claimed by defendant—was on the ground rightfully, and his rights were fixed before anything was done by defendant or Hamilton to put him on inquiry.

Ellison, J.—This suit was commenced before a justice of the peace for double damages under section 809, for killing a mule belonging to plaintiff.

John Hamilton owned a tract of enclosed land through which defendant's road ran. In order to straighten its road through Hamilton's land, defendant

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had determined to build a new track, and for this purpose had purchased from Hamilton the right of way. The new road left the old one on the east side of Hamilton's land, and came to it again on the west side.

Between the new right of way and the old road a narrow strip of Hamilton's land was left coming to points at each end and widening in the center to something over one hundred feet. In the contract of purchase, defendant and Hamilton agreed that before the grading was done, defendant should build a fence on the north side of the new line or right of way; this requirement was incorporated in the deed. It was also agreed that the fence on the north side of the old road might be moved, and the materials used in making the new fence, thus leaving both roads, the one being constructed and the one being operated, enclosed by the same fences. This latter agreement was not in the deed.

After the deed had been taken and recorded, and after defendant had located, marked out and commenced clearing and grading the new road, plaintiff came upon the ground with teams for the purpose of obtaining work in grading the new road. By permission of Hamilton, and under an agreement to pay therefor, plaintiff camped with his teams on this strip of land lying between the two roads, one hundred and ten feet from the track, and sixty feet from the new road.

Afterwards defendant commenced building the new fence and removing the material from the old one. The laborers working on the new road were hauling from the old to the new road, and, with plaintiff's knowledge, had broken the fence. With full knowledge of these facts, plaintiff kept his mules between the two roads. One of them got through the broken fence upon the track, and was struck and killed by a passing train. There was no evidence that plaintiff took any precautions to restrain his mules and prevent them from going upon the track.

Upon this undisputed state of facts, the court, by

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declarations of law, given and refused, held: (1) that plaintiff, when on this strip of land, was an adjoining proprietor, and defendant was bound to keep its road fenced to prevent his mules from going upon the track; (2) that upon the evidence in the case, plaintiff was entitled to recover double damages, under section 809; (3) that plaintiff was not bound by the agreement between defendant and John Hamilton; and (4) that plaintiff was not guilty of such contributory negligence as would prevent his recovery.

These rulings of the court are assigned as error, and upon them defendant relies for a reversal of the judgment.

The foregoing are the facts as set out by the parties to this action, and on this state of facts we will affirm the judgment. The agreement that the fence on the north side of the old road might be removed to the north side of the new road was not incorporated in the deed from Hamilton to the defendant, though the agreement that a fence should be built on the north side of the new road was so incorporated. Plaintiff then had no notice from the deed of such an understanding, and the evidence, in our judgment, fails to show notice to him *aliunde*, or such state of facts as would put him upon his inquiry. A tenant of a land owner is not bound by the agreement of the owner unless he has notice of its existence. *Thomas v. Ry. Co.*, 82 Mo. 538.

II. It is contended by defendant that the fact that the plaintiff permitted his mule to go at large at the place stated, was contributory negligence on his part and ought to prevent his recovery. But plaintiff had the right to turn his mule out, and we are unable see how his knowledge that defendant was compelled by the deed to build a fence north of the new track, would interfere with that right. And though he saw that defendant had broken down portions of the old fence, or removed it entirely, it would not prevent him from lawfully exer-

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cising the right, recognized in this state, of permitting his stock to run at large.

We have examined the remaining objection urged by defendant, but are unable to acquiesce in the view that section 809, Revised Statutes, does not apply to the facts of this case.

The judgment is, with the concurrence of the other judges, affirmed.

BENJAMIN CROW, Respondent, v. WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, November 22, 1886.

1. NEGLIGENCE—CASE ADJUDGED.—A case where the court, after examination of the evidence in the record, refuses to take the case away from the jury, on the claim that plaintiff's negligence directly contributed to his misfortune.

2. ——— INSTRUCTIONS—DUTY OF ENGINEER.—Where, as in this case, instructions were given by the court, directing the jury, that if they believed, etc., that the servants in charge of the train "saw, or by the exercise of reasonable care, etc., could have seen the plaintiff upon its track, then, etc." *Held*, that the instruction should have been so framed as to require the jury to find that the servant of defendant *did see* plaintiff before the collision, in time to have avoided it by the exercise of due effort thereafter, these being peculiarly questions of fact for the jury to determine.

APPEAL from Chariton Circuit Court, HON. C. HAMMOND, Special Judge.

Reversed and remanded.

The case and fact are stated in the opinion.

GEORGE S. GROVER, for the appellant.

II. The trial court should have directed a finding for the defendant, even on testimony of plaintiff's own

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witness. *Maher v. Railroad*, 64 Mo, 267; *Zimmerman v. Railroad*, 71 Mo. 476; *Yarnall v. Railroad*, 75 Mo. 575: *Powell v. Railroad*, 76 Mo. 80; *Rine v. Railroad*, 88 Mo. 395; *O'Donnell v. Railroad*, 7 Mo. App. 190; 1 Thomp. Neg. 450.

II. The instructions given for the plaintiff were inapplicable to this case, and incorrectly declared the law.

III. Defendant's instructions were erroneously refused.

No brief for the respondent.

PHILIPS, P. J—This is an action to recover damages from the defendant, a railroad corporation, for personal injuries consequent upon plaintiff being struck by one of defendant's locomotives. The accident occurred in the city of Chillicothe, Livingston county, on the fourth day of August, 1882. The railroad runs east and west through said city. The depot is on the south side of the track. Approaching the depot from the west the defendant road runs, for several hundred yards, parallel with the Hannibal and St. Joseph Railroad, only fifteen or more feet apart. On the day of the accident the plaintiff had stopped at the Pacific hotel in said city, on the north side of the railroad track, the defendant's track being north of that of the Hannibal and St. Joseph. The hotel was several hundred feet from the depot. The plaintiff, about four o'clock p. m., left the hotel to go to the depot to take passage on some train, to go to his home at the town of Breckinridge, situated on the Hannibal and St. Joseph Railroad. To reach the depot he had to cross both of said tracks. He could have gone from the hotel down certain streets, until arriving opposite the depot, and then crossed over. He appears to have been familiar with the depot and its surroundings; and as the more direct way from his hotel to the depot was along the track of the defendant railroad he chose that way. As it had been raining, and the ground between the tracks was muddy and covered with water.

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he walked on the track. His evidence tended to show that no train was then due on the Wabash road coming from the west; and that as he passed down the track, and a short time prior to the accident, he looked back towards the west and saw no train approaching. As he thus advanced toward the depot a train came in on the Hannibal and St. Joseph track, making considerable noise, ringing the bell and letting off steam. This, it appears, attracted plaintiff's attention. Immediately behind this train suddenly appeared a construction train on defendant's track, coming from the west also. The Hannibal and St. Joseph train had to stop just before reaching the depot to await the change of a switch, when the defendant's train passed it. The evidence tended to show that the Wabash train was running very fast, from twenty to twenty-five miles an hour. The train as it approached was in full view for two or three hundred yards. Whether on account of the noise from trains on parallel tracks, the plaintiff did not hear the approach of defendant's train, and whether the engineer gave any signal of warning except almost at the instant of collision, or whether the engineer made any special effort to avoid running on to the plaintiff, are facts not so clearly developed in the evidence, as to place them beyond question, and were peculiarly matters for the jury, The plaintiff was struck by the engine, and seriously injured. The petition imputes negligence to the defendant on the ground that the train was being run at an unusual and reckless rate of speed, and the failure of the servants to give the statutory signals of warning. It alleges that the engineer on defendant's train was racing with the Hannibal and St. Joseph train. The damages were laid at ten thousand dollars. The jury awarded the plaintiff eight hundred dollars. From this judgment the defendant has appealed.

I. We are asked to reverse this judgment, first, on the ground that the evidence shows the plaintiff's negligence directly contributed to his misfortune, and, sec-

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ond, because the court erred in giving and, refusing certain instructions.

We have made a careful examination of the evidence, as preserved in the bill of exceptions, and are of opinion that we would not be justified in taking the case away from the jury. The rate of speed at which the train was running, at such a time and place, was such as might justify a jury in finding negligence in that respect. And while it is true that the plaintiff was a trespasser on defendant's track, that did not relieve defendant's servants from the legal obligation of exercising a degree of vigilance and caution in approaching the depot commensurate with the danger to life and limb at such point, and the greater difficulty of checking the train in the emergency more likely to arise at such a point than in the country. *Rine v. Railroad*, 88 Mo. 395. The plaintiff, with his back to the west, was in full view of the engineer for several hundred feet before the collision. It was not an unreasonable inference for the jury to make, that the engineer saw him. If he did see the plaintiff, and continued to run down on him at the rate of twenty miles an hour, the question is a proper one for the jury to answer as to whether the engineer put forth reasonable effort to avoid the collision. It is a most significant fact that neither the engineer nor the fireman on defendant's train testified in this case.

II. Instructions were given by the court, directing the jury, that if they believed, etc., that the servants in charge of this train "saw, or, by the exercise of reasonable care, etc., could have seen the plaintiff upon its track," then, etc.

Objection is lodged by appellant against so much of the instruction as would permit a recovery on the ground that the engineer might have seen the plaintiff, regardless of the fact whether or not he did see him. In the recent cases of *Rine v. Railroad*, *supra*, and *Bell v. Railroad* (86 Mo. 599), the supreme court hold that under circumstances much allied to the facts of this case, that

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negligence is not imputable to the engineer until after he actually discovers the peril of the person on the track. An examination of those cases shows that this holding was predicated of the peculiar facts presented in the evidence. I am not clear in my judgment that the facts in this case are not so distinguishable from those as to render the criticism made there inapplicable here. But to avoid any seeming conflict with the ruling of the supreme court, and yielding to what seems to us to be the spirit of its decisions as last promulgated, we feel constrained to hold that the instruction should have been so framed as to require the jury to find that the servant of defendant did see plaintiff before the collision in time to have avoided it by the exercise of due effort thereafter.

As already suggested there were facts and circumstances in evidence from which the jury might have reasonably inferred that the engineer did in fact see the situation of plaintiff prior to the collision; and whether or not he exercised the proper care, and put forth the reasonable effort to save the plaintiff after he discovered the peril are peculiarly questions of fact for the jury to determine.

For the error contained in said instructions the judgment of the circuit court is reversed and the cause remanded. The other judges concur in the result.

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ALBERT GERSTLE, Respondent, v. THE UNION PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, November 22, 1886.

NEGLIGENCE, WHETHER BEING ON THE CAR PLATFORM IS—CASE ADJUDGED.—It is not negligence, as a *matter of law*, that a passenger should be or remain on the platform of a car for a time, though

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there be seats inside, in the absence of a law or regulation against it. But it is proper, in such a case, for the court to submit to the jury, whether under all the circumstances, the plaintiff was in the exercise of due care, when he met with the accident. *Held*, that instructions embodying this view, were properly given, and those antagonizing it were properly refused.

APPEAL from Jackson Circuit Court, HON. TURNER A. GILL, Judge.

Affirmed.

The case and facts are stated in the opinion.

JOHN W. BEEBE, for the appellant.

The court erred in giving instructions for plaintiff against defendant's objection, and in refusing instructions offered by defendant.

GAGE, LADD & SMALL, for the respondent.

I. The instructions asked for by defendant and refused by the court, all, in effect, declared as *matter of law*, that plaintiff was guilty of contributory negligence in being on the platform when the train was in motion. Those given by the court left it to the jury to determine whether he was, under the circumstances, guilty of negligence. The court was clearly right in submitting the question of negligence *to the jury* in this case. *Doss v. Railroad*, 59 Mo. 27; *Kelley v. Railroad*, 70 Mo. 607; *Chetworthy v. Railroad*, 80 Mo. 223; *Goodrich v. Railroad*, 29 Hun [N. Y.] 50; *Maguire v. Railroad*, 115 Mass. 239; *Burns v. Railroad*, 50 Mo. 139.

II. If plaintiff was guilty of negligence in being on the platform at the time he was injured, that negligence was not, in any legal sense, a cause of the injury. If he was negligently there, such negligence may be said to have contributed directly to any injury he might have received from any defect in the platform, or from the motion of the train, but surely not to an injury such as he sustained, the cause of which, namely, the negligent

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act of the conductor, was wholly independent of and disconnected from any act of the plaintiff. Wharton on Neg. [2 Ed.] sects. 302–324.

ELLISON, J.—The evidence in this case shows that the respondent received the injuries for which the suit is brought, under the following circumstances: He was a traveling man, and a passenger on defendant's train from Hays City, Kansas, westward. This train stopped at Ellis for supper. Before its arrival at Hays, some tramps were discovered stealing their passage on the train. After his supper at Ellis, being just after dark in the evening, the respondent seated himself in the smoking car, which was next to the baggage car, and the train started. The train men immediately discovered the same tramps on the first platform of the baggage car, and before it had gone fifty yards, stopped the train and put them off. The tramps ran forward, crossed a bridge, and as the train crossed, again jumped on the same platform. The train was again stopped, and they were again put off. This was repeated several times; during this time the conductor had fired a pistol one or more times to scare them away. At some time after the first stoppage the respondent rose from his seat, went forward to the platform, and standing on the rear platform of the baggage car, looked forward to see what was going on. Finally the train again started, the conductor and train men being still on the ground beside the cars, and the respondent started to return to his seat in the smoking car. As he was passing from the platform of the baggage car to that of the smoking car, the conductor, holding his lantern in one hand and his pistol in the other, caught hold of the railings and swung himself upon the steps, his pistol was exploded as his hand holding the pistol struck the rail, the ball entering the mouth of respondent, seriously injuring him.

At the close of plaintiff's case, defendant offered a demurrer to the evidence, which was overruled. After

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the close of defendant's evidence, it offered several instructions declaring in effect that plaintiff's being on the platform was contributory negligence sufficient to prevent his recovery. These were refused. Defendant tried the case below on the theory that it was responsible for the conduct of the conductor in the use of a pistol, and having done so, we raise no question in that regard. The instructions given for plaintiff and defendant submitted to the jury whether plaintiff's being on the platform of the car, under the circumstances, was such negligence as contributed to the injury complained of. There was a verdict for plaintiff, and defendant appeals.

There is no proof in this cause of any statutory regulation of the state of Kansas as to the right of passengers to be upon the platform of cars. Neither is there any proof of plaintiff being aware of any regulation, in that regard, by the railway company. The defendant's demurrer to the testimony, and the complaint urged against the trial court's action in refusing its instructions, in effect, presents the question whether being on the car platform, though there be seats inside, in the absence of law or regulation against it, is negligence *per se.*

The question has been determined in other tribunals in this and other states, that it was not negligence as a matter of law. *Burns v. Railroad*, 50 Mo. 139; *Goodrich v. Railroad*, 29 Hun, 50; *Maguire v. Railroad*, 115 Mass. 239. In each of these cases it was held to be error for the court to declare as matter of law, such act on the part of plaintiff to be negligence and held proper for the court to submit to the jury whether under all the circumstances the plaintiff was in the exercise of due care when he met with the accident. The cases of Burns and Maguire were for injuries on street cars, while that of Goodrich was on a railway, and it was said in the latter case, quoting from an opinion of the New York court of appeals, that "it is settled that independent of the mandate of the statute, it is not, even in the case of steam

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cars, negligence *per se* for a passenger to stand upon the front platform of a moving car."

Our conclusion is that the instructions offered by defendant were properly refused, and those granted plaintiff were properly given, and we, therefore, affirm the judgment. All concur.

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MARY C. POWELL, Defendant in Error, v. WILLIAM F. POWELL, ADMINISTRATOR OF W. A. POWELL, DECEASED, Plaintiff in Error.

Kansas City Court of Appeals, November 22, 1886.

1. ADMINISTRATION—CARE OF LIVE STOCK AND CROPS AND MAKING REPAIRS UNDER SECTIONS 100 AND 101, REVISED STATUTES.—Under the provisions of sections 100 and 101 of the administration act, the administrator is authorized to "procure indispensable labor," etc. This authorizes him to hire and board hands and to buy food, where necessary to preserve the property, and the statute contemplates that *the estate* should pay this expense, and the claim may be allowed in favor of the meritorious party *against the estate* by the probate court.

2. ——— LIMITATION OF PERIOD TO NEXT TERM OF COURT—FURTHER ORDER AT TERM.—The statute only contemplates that the administrator should exercise the given power in vacation, until the first meeting of the probate court, and thereafter the power and discretion of continuing the provisional arrangement is lodged alone in the probate court. The grant of power being limited to this period, all persons dealing with him, or acting under his directions, must take notice of the limitations of his authority.

3. PRACTICE—DUTY OF COURT WHERE FACTS ARE UNDISPUTED.—Where the facts are undisputed or clear, the court should apply the law and determine the case.

ERROR to Callaway Circuit Court; HON. G. H. BURCKHARTT, Judge.

Reversed and remanded with directions.

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The case is stated in the opinion.

CREWS & THURMOND and BOULWARE, for the plaintiff in error.

I. It was the duty of the administrator to furnish all the necessary labor and care to preserve the estate, and to make report to probate court at its next meeting, and upon his application the court had authority to order an appropriation for payment of the same. Sect. 100, Rev. Stat. And *the court* may order all *further* labor to be done which may be necessary for the preservation of the estate. Sect. 101, Rev. Stat. The labor, if any, of plaintiff, was not done by order of the court, nor has the administrator asked the court to order that it be paid for out of the estate. The probate court had no power or authority to appropriate the funds of the estate for any purpose except such as the statute specially directs, and then only when asked to do so by the proper party.

II. Probate courts are creatures of the statute, and can do nothing except when the statute gives power to do so. Such courts take nothing, as to the exercise of such powers, by implication. *Powers v. Blakey*, 16 Mo. 437; *Lake v. Meier*, 42 Mo. 389; *Coil v. Pitman*, 46 Mo. 51; Kelley's Probate Guide; *Baldwin v. Whitcomb*, 71 Mo. 651.

III. Plaintiff's claim accrued *since the death* of William A. Powell. It is no debt or demand against his estate. It cannot be allowed and classified. The probate court had no power to pay [allow] such claim until asked to do so by the administrator. Sects. 100 and 101, Rev. Stat. No order was made by the court directing that the work and labor be done by the plaintiff, nor has the administrator asked that the court order an appropriation for payment of same, as expenses for administration, or for the preservation of the estate. The court has no jurisdiction or power to order the assets of the estate

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applied to the payment of a claim growing out of a contract made with the administrator, unless it had been ordered by the court *prior* to the creation of the demand, or when the administrator *asks for such order.* *Smarr v. McMaster*, 35 Mo. 349; sect. 100, Rev. Stat.

IV. The court should have declared the law as asked by defendant, and defendant's demurer to the evidence should have been sustained.

S. B. COLLIER, A. FINLEY and JOHN A. HOCKADAY, for the defendant in error.

I. The probate court has original, exclusive jurisdiction over all matters pertaining to expenses of administering of estates. Const. Mo., art. 6, sect. 34; sects. 1176, 192, 100 and 101, and the tenth sub-division of sect. 292, Rev. Stat.; *Mayberry v. McClurg*, 51 Mo. 256; Co. Litt. 291*b*; *Moore, Executor, v. Brown, Admr.*, 14 Mo. 165. The *manner* of its exercise, although not in strict accord with the letter of the statute, if it comes within its spirit and purpose, it is sufficient. *In re Bomino's Estate*, 83 Mo. 441; *Dubois v. Sands*, 43 Barb. [N. Y.] 412. The rule limiting probate jurisdiction to statute authority is not altogether without exception. 76 Mo. 296.

II. The purpose of the statute was to secure the preservation of the property of estates from destruction and injury, by providing means for its security and protection, through the administrator and the probate court, whose authority is absolute and complete. *Smarr v. McMaster*, 35 Mo. 351. The action of the probate court in sanctioning the expenditure for the preservation of the property, after it was done, instead of authorizing it in advance, was a substantial compliance with the statute, and legalized the action of the administrator in the premises. Brown's Legal Maxims (Ratification), 539. The contract was a legal and valid one against *the estate*, and the failure of the administrator to advise the court of

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it, at its next meeting thereafter, does not avoid the contract.

III. The widow's quarantine rights extended to the entire farm. Sect. 2205, Rev. Stat.

IV. Plaintiff's compliance with the terms of the contract, bound the estate to pay a reasonable compensation. The estate must meet the liability. *Hay, Admr., v. Walker*, 65 Mo. 17; 2 Greenl. on Evidence, sect. 108; sect. 100, Rev. Stat.

PHILIPS, P. J.—This controversy arises on the presentation for allowance of a claim in favor of Mary C. Powell against the estate of her husband, William A. Powell. Said William died intestate in Callaway county, in the month of June, 1884. In the same month letters of administration were granted on his estate to Wm. F. Powell, father of the deceased. Belonging to the estate were a large number of cattle, hogs and sheep. The widow, with the minor children, remained in possession of the dwelling house and messuage. It was the wish of the deceased, expressed just before his death, that the said stock be retained on the farm until they were sold under administration. On consultation between the widow and the administrator it was mutually deemed best for the interest of the estate that the stock be so retained, and not sold until the following March. The administrator furnished the hands to care for the stock, who were boarded by the widow on the farm. She was to have the use of the milk and butter produced by the cows.

Nothing was said between the parties to this arrangement about any compensation to the widow on this account. During the time of her occupancy of the dwelling house she had some repairs made thereon, for which she paid.

In August, 1885, she duly presented for allowance against the estate a claim for the board of the hands during the time the stock were kept on the farm, for

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pasturage, etc., used by the stock, and for the amount of said repairs, amounting in the aggregate to four hundred and seventy-nine dollars.

The probate court allowed this account, after deducting certain credits, for the sum of $286.45. The administrator appealed to the circuit court, where on trial *de novo*, the claimant again prevailed, and had judgment for two hundred and eighty-six dollars, from which the administrator prosecutes this writ of error.

I. The first observation, suggested by the admitted facts, is, that none of the acts in question were done under the sanction or order of the probate court. As to the item of the account for repairs to the dwelling house, it is conceded there was no order of the court authorizing it to be done, and that it should be excluded. While the instructions, as shown by the bill of exceptions, would indicate that the court, sitting as a jury, held that this item was allowable, the phraseology of the judgment itself clearly indicates that the court did not include it in the amount of the judgment.

The more important questions to be determined are, as to the proper construction to be placed upon the following sections of the statute:

"Section 100. If any person die, leaving horses, or other stock, that require attention, crops ungathered, property so exposed as to be in danger of loss in value, or work in an unfinished state, so that the estate would suffer material loss from the want of care and additional labor, the executor or administrator may, until the meeting of the court, procure such indispensable labor to be performed, on the most reasonable terms that he can.

"Section 101. The court, on the application of any person interested, may, in such cases, authorize further labor to be performed, as the interest of the estate requires, and all sums thus paid, if approved by the court, shall be allowed as expenses of administration."

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The contention of defendant in error is, first, that the intendment of the statute is not to create a claim against the estate in favor of the third party, who may furnish these supplies to the administrator, but it contemplates that the administrator shall furnish them, and receive credit therefor in his settlement; and, second, that the statute does not recognize the right of the administrator to make such provisional arrangement longer than the vacation of court.

As to the first proposition, it is true that the general provisions of the statute for allowance of demands against estates apply only to demands existing at the time of the death of the intestate or testator. But it occurs to me that the provisions made in said sections 100–101 are exceptional, and were designed to meet an emergency not hitherto provided for.

Section 100 expressly authorizes the administrator to "*procure* such indispensable labor." Unquestionably this authorizes him to hire and board hands and to buy food, where necessary, to preserve the property. Equally clear is it that the statute contemplates that the estate should pay this expense. It is not a personal matter or undertaking of the person upon whom the burden of administration is cast. He is acting solely in an official or trust capacity, for the exclusive benefit of the estate. The law ought not to, and we think did not, intend that an administrator should advance the necessary funds out of his own pocket for the protection of the beneficiaries of the estate. A person might die leaving a large number of cattle in the midst of winter, needing daily care and food; not one dollar in money may be found among his effects. The administrator, in fidelity to his trust, should provide the necessary care and sustenance to prevent this property from perishing or depreciating. He may not have in his own right any means to advance for this purpose. What is he to do? What does this statute declare he may or should do? He should

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"*procure* such indispensable labor to be performed," to be "allowed as expenses of administration."

The general rule of law, as well as of reason and justice, is that the authority to have a thing done by an agent or trustee implies that the principal, who receives the benefit, must pay therefor. *Copp v. St. Louis Co.*, 34 Mo. 388.

Wagner, J., in commenting on this same provision of the statute, in *Merritt v. Merritt* (62 Mo. 155), said: "In all the instances enumerated in this section of the statute, the executor or administrator has full authority to act, and whatever he does is legalized."

A thing within the intention of the legislature in framing a statute is sometimes as much within the statute as if it were within the letter. *In re Bomino's Estate*, 83 Mo. 441.

It was clearly within the intention of the legislature that the expenses attending the exercise of the power lodged in the administrator should constitute a charge against the estate to be discharged out of the assets.

The account must be presented to the probate court for its inspection and approval. What difference can it make to the parties in interest whether it be presented for allowance by the administrator or the party who gave the credit? The law looks to substance rather than mere form.

An administrator refuses to pay for the necessary supplies. What is the remedy of the party who has done the work, procured to be done by the administrator in the exercise of the statutory power?

It is not a personal undertaking of the administrator. He could not be made liable on the ground that he had acted without a responsible principal, or without warrant of law. He could not obtain the credit on settlement made, for he has not in fact paid out the money.

The court for the protection of the estate against unreasonable provision made by the administrator, is to pass upon the claim.

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It would, in my opinion, be sticking in the bark to say the claim can only be allowed as a credit to the administrator, instead of allowing it in favor of the meritorious party, whom the statute authorized the administrator to employ.

We think the conclusion reached by us is sustained by the principle of the case of *Smarr v. McMaster* (35 Mo. 351), followed in *North v. Walker* (66 Mo. 453).

II. The other objection is, that at all events the statute only contemplates that the administrator should exercise the given power in vacation, until the first meeting of the probate court, and thereafter the power and discretion of continuing the provisional arrangement is lodged alone in the probate court.

We do not see any legal escape from this proposition. Section 111 of this statute evidently contemplates that within a reasonable time after the grant of letters of administration, "after the appraisement," the administrator "shall sell at public sale all goods and chattels of the deceased that are liable to perish, be consumed, or rendered worse by the keeping." It was in the mind of the legislature, in framing this statute, that such property would not ordinarily be kept on hand but a short time, and if for any extraordinary cause or sufficient reason it should be longer retained by the administrator without sale, the court, at its first meeting afterward, would pass upon and direct the further course to be pursued.

So section 100 empowers the administrator to act upon his own judgment during the vacation of court, "until the meeting of the court."

And section 101, following up the plan, provides that the court, on the application of any person interested, may, in such case, authorize further labor, the expenses attending the same to "be allowed as expenses of administration."

The grant of power to the administrator to act *sua*

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sponte, being limited to the period intervening between the grant of his letters and the meeting of court, all persons dealing with him or acting under his directions, must take notice of the limitations of his authority. Having proceeded outside of the statute, in their domestic arrangement for keeping this property over the winter, they must look outside of the law for a remedy to enforce the arrangement. Any other construction of the statute would thwart its policy, which is to keep administrators in charge of estates under constant restraint, and the supervisory control of the probate judge.

It results from the foregoing view, that only that portion of the account, if otherwise regular, which accrued prior to the meeting of court can be allowed against the estate.

III. The only remaining question is one of law and fact: Did the claimant render the services in question under contract, express or implied?

She admits that nothing was said about the pay. There was, therefore, no express contract. Was there any implied agreement? In other words, are the facts in evidence such as the law will imply an undertaking or obligation for compensation to the claimant.

Where the facts are undisputed or clear, the court should apply the law and determine the case. The evidence of both parties agree that it was the wish of the intestate that this property should remain on the farm until sold, and that in deference to his wishes, and believing it would be best for all concerned, the widow and administrator acceded thereto, and deferred the sale until March following.

The clear and reasonable conclusion is, that as the widow was to occupy the farm during her quarantine, and her own interests were to be subserved, and the wishes of her dead husband were to be respected, no charge was to be created in her favor against the estate, by pasturing the stock on the premises during the sum-

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mer months, as the court would sit in August. This conclusion is further sustained by the admitted arrangement that the widow was to enjoy the use of the milk and butter produced by the cows.

The law will not raise any implied contract for compensation under such a state of facts.

As to the item for board of hands, up to the meeting of the first term of the probate court we are of opinion that the claim is sustained. It cannot be maintained that it was in the contemplation of the administrator that the widow should defray the expense of boarding the hands. If the administrator was to furnish the hands, the presumption is that he should board them, and when he left them for the widow to board the law implies that she should be compensated therefor.

IV. The claimant allowed on her whole account, as presented for allowance, certain credits consisting of claims against the estate.

Of course, in disallowing her claim against the estate, she would not be precluded thereafter from asserting her right to the amounts thus credited, provided they are otherwise admissible.

It results from the foregoing opinion that the judgment of the circuit court is reversed, and the cause remanded with directions to the trial court to re-try the case as to the items for board of hands, if any, up to the time of the meeting of the probate court after the grant of letters of administration, and to certify its judgment thereon to the probate court, as by law provided. All concur.

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JAMES STEVENS, Respondent, v. DENNIS SPRINGER ET AL., Appellants.

Kansas City Court of Appeals, November 22, 1886.

1. CLAIM OF PROPERTY UNDER SECTIONS 2366 AND 2367, REVISED STATUTES—EFFECT OF THE PROCEEDINGS UNDER.—The proceeding provided by the statute (sects. 2366, 2367, Rev. Stat.) for the trial of the rights of property (in the case of personal property seized under execution), by any other than the debtor in the execution, is a judicial proceeding, and a judgment thereon is as conclusive as a judgment in any other judicial proceeding. It is a formal trial in court of the rights of property.

2. ——— MAKING OF CLAIM NOT THE EXCLUSIVE REMEDY—REMEDY AGAINST SHERIFF.—A claim made under the provisions of this statute does not deprive the claimant of his remedy against the sheriff on his official bond. The statute does not purport to make this remedy exclusive of all other remedies, and resort to it is not obligatory on the claimant.

3. DAMAGES—MEASURE OF—HOW PROOF OF MADE.—The proof of value is generally by the judgment or opinion of witnesses. If the article has a market value, that will usually control as the best evidence of its value. If this test has been applied to it by the sale of it the fact may be proved as evidence of its value. Even the amount the goods cost is admissible, and so the amount sold for at auction has been admitted. But proof of the value of goods when worn can scarcely be ascertained, except by reference to the former price and the extent of depreciation. 2 Sutherland on Damages, 375–376. But the purpose for which the goods are to be used, cannot, in any way, affect the real value of the property. The true test is the value of the property as chattels.

APPEAL from Barton Circuit Court, HON. CHARLES G. BURTON, Judge.

Reversed and remanded.

Statement of case by the court.

This was an action for the conversion of the following personal property :

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"One fifteen-ball Brunswick pool table and sixteen pool balls, one Brunswick billiard table and twenty-two cues, and four billiard balls, one ice chest, one bar and counter, glassware, fixtures and bottles, and two chandeliers, one hanging lamp, four bracket lamps, one mirror, seven pictures, nine chairs, two bar or movable lamps and one clock."

The defendant, Springer, seized the property as that of one Norris under an execution from the Barton circuit court in favor of the defendant, Griswold, against Norris and another. The plaintiff claimed the property as his own absolutely in the manner provided by section 2366, Revised Statutes. Griswold gave to the sheriff, Springer, an indemnifying bond, which for the purposes of this case may be said to have been such as required by the statute. The plaintiff as claimant did not make the bond provided by the statute.

The sheriff proceeded to sell the property under the execution as the property of Norris. The sheriff returned the claim and the bond aforesaid to the circuit court, and Griswold, having filed a denial of the claim, the question whether the plaintiff owned the property was, in that court, tried in the manner provided by section 2367, Revised Statutes. The property was found to belong to the plaintiff; judgment was accordingly rendered as provided by the statute and the sheriff was by the judgment directed to release the property to the plaintiff, which the sheriff could not do on account of having already sold and disposed of it.

Upon the question of the value of the property the plaintiff introduced the following evidence:

The plaintiff testified: "All the property I owned in Norris' saloon was worth about one thousand dollars."

Cross-examination: "I got the fifteen-ball pool table from Collin Cockrell, in Cherokee, Kansas; it was second hand at that time; it had been used in a saloon before I got it; do not know how long. Bought a great many articles from Collin Cockrell, a billiard table,

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some billiard balls and cues, and some other things, but cannot tell what; they were all second hand goods. After I got these things, I bought new pool balls and new cloths and covers for both the pool table and billiard table; also some small numbered pool balls, and some new billiard balls and new pin pool balls. Think I contracted to pay Cockrell four hundred and fifty dollars for the things I got of him. He talked some of going into partnership with me at that time, and the understanding was that if he did not do so, I was to pay him four hundred and fifty dollars. I bought two billiard tables and some glass ware of Mr. House, at Fort Scott, Kansas, and traded these two tables to Cockrell for the things I got of him. The counter, pictures and glass ware I got of House I put into the saloon. Paid House in the neighborhood of six hundred dollars for the things I got of him, but do not remember the exact amount; they were also second hand goods, had been used in the saloon business; don't know how long. The two tables I got of House were worth about one hundred dollars each. * * * A new table like the one levied upon by Springer would be worth, now, about two hundred and seventy-five dollars; and a new pool table would be worth about three hundred and twenty-five dollars."

On behalf of plaintiff, Wandall Crawford, testified as follows:

"I lived in Lamar, March, 1882. I was at Norris' saloon and saw the goods levied upon by Dennis Springer. The property, just as it stood in the building, would have been worth about one thousand dollars. It was sold at place where it stood."

Cross-examination: "I bought the billiard table at the sheriff's sale for sixty-six dollars; the pool table for fifty dollars; the counter for fifteen dollars; lamps for $2.50. William Wells bought most of the glassware. The goods had all been used some. They were second-hand goods. The billiard table, new, would have been

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worth two hundred and seventy-five dollars; and the pool table, new, would have been worth three hundred and twenty-five. Refitted, they would be worth twenty-five dollars to fifty dollars less than new ones."

Frank Parker, on behalf of plaintiff, testified: "I am acquainted with the goods taken by Dennis Springer from William A. Norris. He took every thing in the saloon except the stove. Have been acquainted with the value of that kind of goods, more or less, for the last four years. Making a rough guess at it, I think these goods ought to be worth one thousand dollars to one thousand and two hundred dollars."

John Jackson, on behalf of plaintiff, testified: "Had some knowledge of the value of saloon property and fixtures, and with the things in Norris' saloon. Could not state what they would be reasonably worth."

William Wells, on behalf of plaintiff, testified: "Have had some acquaintance with the value of saloon fixtures, billiard tables, etc. I saw the articles that were sold by sheriff Springer, in the Norris saloon, on an execution against Norris. I never bought any second hand goods of this kind. It would take one thousand dollars or one thousand and one hundred dollars to fit up a saloon new, with new goods, such as those in Norris' saloon; but do not know what it would cost to fit it up with second hand goods like these. Tables were fitted up nearly as good as new. Counter was in good preservation, but it did not sell at the sale for what it was worth. It brought thirteen or fifteen dollars at the sale, and I afterward bought it from Mr. Crawford for fifty dollars; it was worth about two hundred dollars; probably cost three hundred dollars new; it was a fine one."

Cross-examination: "Do not know how long Collin Cockrell used these things over in Kansas; nor how long Norris used them. Second hand goods generally sell for less than new ones. They would depreciate from

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one-half to two-thirds in value by being second hand goods."

The court rejected evidence offered by the defendants of the amount for which the sheriff sold the goods.

BULER & TIMMONDS, for the appellants.

I. Under the present statutes, when personal property is seized under execution, and is claimed by any other than the execution creditor and written claim is made, and the execution creditor gives bond, recourse must be had *on that bond*, and not by suit in trespass against the sheriff. Sect. 2366, Rev. Stat.; Laws Mo. (1877) p. 251; *State v. Platt*, 52 Mo. 466; *Bradley v. Holloway*, 28 Mo. 150; *State v. Lutzinger*, 41 Mo. 498; *Dodd v. Thomas*, 69 Mo. 364; *Steel v. Farber*, 37 Mo. 71.

II. The question of ownership was not *res adjudicata* in this case against defendant, Springer. *Henry v. Wood*, 77 Mo. 277; 1 Greenl. Evid., sects. 189, 535.

III. Evidence as to the amount the goods actually brought at sheriff's sale is admissible; and the court committed error in rejecting such testimony, and also in giving its second instruction on that point. *State v. Jacob*, 2 Mo. App. 183; *Truitt v. Baird*, 12 Kansas, 420; *Paine v. Boston*, 4 Allen (Mass.) 168; *Harrison v. Glover*, 72 N. Y. 451; 2 Greenl. Evid., sect. 640.

IV. The instructions given for plaintiff were erroneous. Those asked by defendant should have been given.

THURMAN & WRAY, for the respondent.

I. All statutory remedies are cumulative unless in terms, they repeal the existing common law remedies, and statutes in derogation of the common law are to be construed strictly. *Railroad v. Hecht*, 5 Otto (U. S.) 168; *Malcom v. Rogers*, 5 Cowen (N. Y.) 188; 24 Ill. 105; 89 Ill. 571; 35 Am. Rep. 182; 125 Mass. 190; *State v. Clinton*, 57 Mo. 390; *Schell v. Leland*, 45 Mo. 289.

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II. Section 2366, Revised Statutes, provides a summary remedy for the trial of the rights of property between the claimant, the sheriff and the execution creditor, and does not repeal the common law remedies of trespass, trover or replevin. *Belkin v. Hill*, 53 Mo. 492; *State ex rel. Martin v. McBride*, 81 Mo. 349; *Roberts v. Heirn*, 27 Ala. 676; *Elliott v. Heyden*, 104 Mass. 180; *Knight v. Nelson*, 117 Mass. 459.

III. The measure of damage in trespass where the taking is by an officer and without malice, as in this case, is the market value of the property at the time and place of taking with legal interest thereon from the time of the taking. Sedgwick on Meas. Damages, 530; *State ex rel. v. Smith*, 31 Mo. 566; *Gilson v. Wood*, 20 Ill. 37; *Brown v. Allen*, 35 Iowa, 306; *Dalton v. Louderdale*, 27 Mich. 529. The price realized at a forced sale by a wrong-doer can never be sanctioned as a proper criterion for ascertaining the actual value of goods. *Campbell v. Woodworth*, 26 Barb. (N. Y.) 648; *Morton v. Scull*, 23 Ark. 289; *Haner v. Hathaway*, 33 Cal. 117; *McLean v. Birdsong*, 24 Georgia, 265; *Ellis v. Wise*, 33 Ind. 127; *Spencer v. Vance*, 57 Mo. 428; *Seibel v. Siemon*, 72 Mo. 531.

IV. A trial under the statute, is *res adjudicata* as to the ownership of the property between the execution creditor and sheriff, on the one hand, and the claimant on the other. Wells on *Res Adjudicata*, sects. 16–67; *Wood v. Easel*, 63 Mo. 193; *Harvie v. Turner*, 46 Mo. 444; *Roberts v. Heirn*, 27 Ala. 676; *Emery v. Fowler*, 39 Maine, 331.

V. The bond taken by the sheriff in this case, containing no condition to indemnify the claimant, as required by section 2366, Revised Statutes, would be no bar to a suit in trespass under the acts of 1855. *Dairy Co. v. Sauer*, 16 Mo. App. 1.

HALL, J.—The court held that the plaintiff was not precluded from bringing this action because he made

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claim to the property and his claim was tried and disposed of in the manner provided by the statute; that the plaintiff was not for said reasons confined to his remedy on the idemnifying bond given by the execution creditor.

The court also held that the judgment of the circuit court upon the question of the plaintiff's ownership of the property was, as to such question, *res adjudicata* upon both the defendants in this suit.

The court held that evidence of what the property sold for at the sheriff's sale was not competent upon the question of the value of the property. As to the measure of damages the court gave the following instruction:

"2. The court instructs the jury that in determining the value of the property described in plaintiff's petition, they will assess the same at such sum as they shall believe from the evidence it was reasonably worth, taking into consideration the purpose for which the same was intended to be used, in the building where the same was at the time of the seizure by defendants, and not what plaintiff paid for it, nor what it was sold for by defendant, Springer."

The defendant complains of the action of the court in each of the particulars named.

By section 2366, Revised Statutes, it is provided that, when any other than the debtor in the execution shall, in writing, verified by affidavi t claim personal property seized under execution, the officer making the seizure shall at once deliver a copy of the claim to the execution creditor or his attorney of record; and that, unless the execution creditor, within a reasonable time thereafter, execute and deliver to said officer an indemnifying bond, such as provided in the statute, the officer shall abandon such levy and release the property to the claimant. Provision is also made for the claimant retaining possession of the property by giving bond. It is further provided by said section as follows: "Such bond may be sued on at the instance of any person in-

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jured, in the name of the state to the use of such person, for any breach of the condition of such bonds; and the damage which such person shall sustain shall be recovered thereon, if the execution creditor shall give bond as above provided."

By section 2367, Revised Statutes, it is provided that, "The officer shall return the claim and such bond or bonds as shall have been taken by him to the court to which the execution may be returnable, on or before the first day of the next term thereof, and the clerk shall enter the matter upon the docket, as near as it may be as civil cases are docketed, and the matter shall, unless continued for cause, be tried at the term at which the claim is returned. The execution creditor shall answer or demur to the claim returned by the officer, on or before the first day of the term, and the claimant may reply to the answer within such time as may be directed by the court, and all proceedings in relation to such claim shall be governed, as far as practicable, by the law relating to pleadings and practice in civil actions. If the execution creditor shall fail to answer or demur, as herein provided, or the judgment shall be in favor of the claimant, the court shall, by its order, direct the officer to release such property to the claimant, and shall enter judgment for costs against the execution creditor and his sureties. * * *"

The proceeding thus provided by the statute for the trial of the rights of property is a judicial proceeding, and a judgment therein is as conclusive as a judgment in any other judicial proceeding.

As said in the *State ex rel. v. McBride* (81 Mo. 354), "The act provides for the pleadings in respect to the claim by answer, demurrer and reply. It, also, directs the nature and form of the judgments to be rendered. * * * It evidently contemplates a special suit, or proceeding upon the claim returned into court, which is made to take the place of a petition, to be answered or demurred to like any other statement of a cause of action."

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And as said in *Houx v. Shaw* (18 Mo. App. 49), the trial is "a formal trial in court of the rights of property."

In *State ex rel. v. McBride*, it was held that a claim made by one, under the provisions of the statute of 1879, did not deprive him of his remedy against the sheriff on his official bond. In discussing the matter Martin, C., who delivered the opinion of the court said: "Indeed, the statute does not purport to make this summary remedy exclusive of all other remedies, for in section 2366, it is provided that 'such bonds may be sued on at the instance of any person injured in the name of the state to the use of such person for any breach of the condition of such bonds.' While it thus appears that the summary, or supplemental proceeding on execution does not exclude an independent action on the bond, the right of action so permitted on the bond does not purport to be exclusive of other forms of action, and resort to it is not obligatory on the claimant. The section provides only that '*such bonds may be sued on.*'"

It will be noticed that the concluding words of section 2366, touching suits upon the bonds provided for therein, "*and the damage which such person shall sustain shall be recovered thereon*, if the execution creditor shall give bond as above provided," are not mentioned by Martin, C., in his opinion. Those words would seem to be so express and exclusive in their nature as to limit the remedy of the claimant to a suit upon the bond, given by the execution creditor, for the damages sustained by the levy and seizure. But the supreme court, in the case mentioned, has plainly held otherwise, and we, therefore, are bound to so hold. We cannot assume that the supreme court overlooked the concluding words of section 2366.

The statutory proceeding, had for the trial of the rights of property, was a judicial proceeding, but it did not, of course, bind any one but the parties thereto and their privies.

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The claimant and the execution creditor were, of course, parties. And if it be true that the statutory remedy which the claimant had elected to pursue did not exclude him from maintaining afterwards an action for trespass against the sheriff, we cannot perceive why the sheriff was not also a party to the said proceeding. Under such construction of our statute, the issue made in the said proceeding was made to protect the sheriff in his levy on the goods claimed by the claimant, and the question for trial was the ownership by the claimant of the goods *and the sheriff's right to levy thereon.* In other words, the sheriff's right to seize and hold the goods was on trial in a legal proceeding for that purpose, and he was a party to the proceeding, for he must be considered a party to a proceeding in which his rights were legally litigated and determined.

The sheriff may not have been, strictly speaking, a party to the record, but he was a real party in interest and that suffices. *State to use v. Coste*, 36 Mo. 438.

The claimant would have been bound by a judgment against him not only as to the execution creditor, but also as to the sheriff, and the sheriff was bound by the judgment in the claimant's favor. Had the sheriff retained possession of the goods until the rendition of the judgment, he would have been bound by the judgment and would have been obliged to release the goods to the claimant. The sheriff was not liable simply because he sold the goods under the execution prior to the judgment aforesaid, but he was not in any better position by reason thereof. He was, notwithstanding the sale of the goods, bound by the said judgment. The judgment was by the statute intended to settle the rights of the claimant, the sheriff and the execution creditor, involved in the seizure of the goods under the execution, so far as they depended upon the claimant's ownership of the goods, and the judgment, in so far as concerns the claimant's ownership of the goods, was *res adjudicata* upon the claimant, the sheriff and the execution creditor.

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In this case there were no aggravating circumstances. The measure of damages was the value of the property at the time it was seized by the sheriff, with legal interest thereon up to the trial. *Walker v. Borland*, 21 Mo. 292; *State to use v. Smith*, 31 Mo. 572; *Spencer v. Vance*, 57 Mo. 430; *Seibel v. Siemon*, 72 Mo. 531.

Not only is it conceded by counsel for plaintiff that the measure of damages is as thus stated, but it is contended by them that this is so. The contention is made to support the action of the court refusing to permit the defendants to prove what the sheriff sold the goods for. "The proof of value is generally by the judgment or opinion of witnesses. If the article in question has a market value, that will usually control as the best evidence of its value. If this test has been applied to it by actual sale of it, the fact may be proved as evidence of its value. It is not conclusive, but tends to show its value, and in the absence of other evidence would suffice. Even the amount the goods cost is admissible for the same purpose. * * * So the amount sold for at auction has been admitted." 2 Sutherland on Damages, 375-6.

Had the market value of the goods at the time of the conversion been susceptible of such definite proof as the market value of staple articles of merchandise is, evidence of the market value of the goods at any other time, either prior or subsequent to the conversion, would not have been competent. But the market value of the goods was not susceptible of such proof. Proof of the value of such goods, "when worn, can scarcely be ascertained except by reference to the former price and the extent of depreciation." *Luse v. Jones*, 39 N. J. Law, 709.

The price of new goods of the kind in question was competent as a basis for comparison. Most of the goods had been purchased by the plaintiff as second-hand goods in the first place. The price paid by him was not

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conclusive, either for or against him, but it was competent as one item of evidence tending to show the value of the goods at the time of the purchase as a basis for comparison, according as the goods had improved or deteriorated in value. And the price for which the sheriff sold the goods was admissible as some evidence of the value of the goods when seized; it was not conclusive, but it was one circumstance going to show the said value of the goods. Both the price paid by the plaintiff and the price obtained by the sheriff were for the jury's consideration and entitled to such weight as they might have seen proper to give to those facts under all the circumstances in evidence. 1 Sutherland on Damages, 796–799, and cases cited.

The court erred in refusing to permit the defendant to prove what the sheriff sold the goods for, and we think that the court more seriously erred, especially under the evidence in this case, in telling the jury that they might, in determining the value of the property, take into consideration "the purpose for which the same was intended to be used in the building where the same was, at the time of the seizure by defendants." Such purpose did not in any way affect the real value of the property. For the purpose mentioned the property might have been as valuable as new property of the same kind, but yet the measure of damages would not on that account have been the value of such new property. The true test, the correct measure of damages, as we have said, was the value of the property at the time of the seizure, and by value we mean the value of the property as chattels, and not as fixtures in the building used for the purposes of a saloon. The question was, not what was the value of the property as such fixtures, but what was the value of the property as chattels, in the market. Had the instruction alluded to not contained the objectionable words, it would have read as follows:

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"The court instructs the jury that in determining the value of the property described in plaintiff's petition, they will assess the same at such sum as they shall believe, from the evidence, it was reasonably worth, and not (at) what plaintiff paid for it, nor what it was sold for by defendant, Springer."

And if the court had given the instruction in that form, and had also given in connection with it the seventh instruction asked by the defendants and rejected by the court, the court would have declared the law as we think it should have been declared. The instruction referred to was as follows:

"7. The court instructs the jury that in arriving at the reasonable value of the goods in question, they may take into consideration the price which the goods brought, both at private and public sale, as well as all the facts and circumstances given in evidence."

Judgment reversed and cause remanded. Ellison, J., concurs; Philips, P. J., not sitting.

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STATE OF MISSOURI, Respondent, v. BENJAMIN DURKEM, Appellant.

Kansas City Court of Appeals, November 22, 1886.

1. CRIMINAL LAW—INDICTMENT—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION—CASE ADJUDGED.—Where the proof shows sales by defendant's clerk, instead of by defendant himself, it yet sustains the indictment. Proof of a sale made by the clerk makes a *prima facie* case against the principal, unless he shows that the sale was made without his knowledge or authority.

2. ——— INSTRUCTION—PRESUMPTION FROM NOT SHOWING LICENSE. Although an instruction tells the jury that defendant admits he had no license at a period therein named—and such an admission does not appear in the record—still the instruction could not have

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harmed defendant, for if he had a license, at the time, it was incumbent on him to show it, and not having done so, it is presumed none existed.

APPEAL from Cole Circuit Court, HON. E. L. EDWARDS, Judge.

Affirmed.

The case is stated in the opinion.

EDWARDS & DAVISON, for the appellant.

I. There is no evidence to sustain the verdict. There was no proof of sale of liquor by *defendant.*

II. The instruction given for the state was not law. There was no evidence that any one acted as barkeeper for defendant. Instructions must be based upon the evidence. Again there is no evidence that the indictment was ever filed.

III. The demurrer interposed by defendant to the evidence, at the close of the state's case, should have been given. There is no evidence in the record tending to show that the defendant in this case, either by himself, or through any clerk or bartender, ever sold in Cole county, any intoxicating liquor, in less quantity than one gallon, at any time that he did not have a license to do so.

IV. The indictment charges the sale to have been made by the defendant, and *not* that it was made by a clerk, or that he permitted it to be sold, and the instruction for the state, *telling the jury that if defendant, or any one in his employment as barkeeper did sell*, etc., they will find him guilty, should not have been given. There is no evidence of any sale. In order to constitute a sale there must be a *price paid* for the thing sold.

V. The *third* instruction assumes that defendant *admitted* that he had no license at a certain period. There is no evidence of such admission in the record. The instruction was in the face of the evidence and should not have been given.

No brief for the respondent.

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ELLISON, J.—Defendant was indicted for selling intoxicating liquor in less quantity than one gallon without a license. Objection is made that the evidence does not sustain the conviction.

An examination of the testimony satisfies us that the objection is not well taken. Though the proof shows sales by defendant's clerk instead of by defendant himself, it yet sustains the indictment. Either may be indicted. *Schmidt v. State*, 14 Mo. 103. Proof of a sale by the clerk makes a *prima facie* case against the principal, and if he wishes to escape he must rebut it by proof, showing that the sale was without his knowledge or authority. *State v. Reily*, 70 Mo. 521.

It is next objected that the court erred in giving instruction number three, for the state, wherein the jury is told that defendant admitted he had no license from August to March 19. Such an admission does not appear in the record, but the instruction cannot have harmed defendant, for if he had a license between those dates, it was incumbent on him to show it, and not having done so, it is presumed none existed.

The instruction, therefore, while not literally true, and while it should not have been given, as worded, has resulted in no injury to defendant.

The judgment is affirmed. All concur.

WILLIAM L. WOOD, Respondent, v. JACOB HILBISH, Appellant.

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Kansas City Court of Appeals, November 22, 1886.

1. PLEADING—SLANDER — DENIAL OF CHARGE AND JUSTIFICATION NOT INCONSISTENT.—Under our code the defendant, in action for slander

may, in his answer, deny the speaking of the words and justify; the denial and the justification are not inconsistent; proof of one does not disprove the other; the truth of the words spoken does not prove the speaking of the words, and this is the test of inconsistency. Bliss on Code Pleading, sect. 314.

2. SLANDER—PROOF OF SPEAKING THE WORDS CHARGED, OR THEIR EQUIVALENT REQUISITE.—Where the speaking of the words charged is at issue under the pleadings, it devolves upon the plaintiff to prove the speaking of the words charged, or of such of them as contained the precise charge of slander averred. Proof of other words of substantially the same meaning as the words charged, is not sufficient.

3. ——— WORDS NOT ACTIONABLE PER SE—AVERMENT OF EXTRINSIC FACTS, WHEN NECESSARY.—Where the words spoken are not actionable *per se;* and extrinsic facts make them such as to impute crime, it is necessary, by prefatory averments, to set out in the petition the extrinsic facts. It is not sufficient to make these facts appear by *innuendo*; for it is not the office of the *innuendo* to make averments, but to apply the words or explain their meaning.

4. ——— WORDS ACTIONABLE PER SE—PROOF OF MALICE NOT NECESSARY—DAMAGES.—Where words spoken are actionable *per se*—slanderous of themselves—the law *implies* malice, and it is not necessary for the plaintiff to *prove* malice; and the plaintiff is entitled to recover as damages a fair and reasonable compensation for the injury naturally and probably done to him thereby, whether the defendant spoke the words with malice in fact or not. And, without proof of actual malice, the jury are at liberty to give the plaintiff such exemplary damages as they might believe it proper to impose as a punishment on the defendant.

APPEAL from Daviess Circuit Court, HON. C. H. S. GOODMAN, Judge.

Reversed and remanded.

Statement of case by the court.

This was an action of slander. The petition was in three counts. The plaintiff dismissed as to the third count, and the jury found for the plaintiff on the first count only. The defamatory words charged in the first count of the petition to have been spoken of the plaintiff by the defendant, were: "I will not keep him (meaning the plaintiff), all summer, for I have to watch

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my pocket book too close. He (meaning the plaintiff), stole fifteen dollars from me at one time, and ten dollars at another," thereby intending to charge, and intending that those who heard him should understand him to charge, and those who heard him did understand him to charge, that plaintiff had been guilty of the crime of larceny.

The answer, after a general denial, contained the following: "And for further answer to said petition, and to each and every count thereof, this defendant pleads the following mitigating circumstances, and says:" (Here the answer, at much length, and with great detail, set out the facts following); that during a period of time prior to the alleged speaking of the slanderous words the plaintiff had been in the defendant's employment and had lived in defendant's house, sleeping in the same bed with him; that no one during such time had slept in the house other than the plaintiff and the defendant, and that the house had been protected at night by locked doors, etc.; that the plaintiff well knew that the defendant usually carried in the pocket of his pantaloons a pocket book containing from twenty to sixty dollars; that the defendant was in the habit of arising early and of making the fire in the cook stove in a room other than the room occupied by the plaintiff and defendant as a bed room, and that the defendant on such occasions left his pantaloons with his pocket-book in the bed room until his return, the plaintiff remaining in bed; that on three several occasions the defendant after returning to the bed room found that money was missing from the pocket-book, a five dollar bill gone on the first occasion, a twenty dollar bill on the second occasion, and on the third occasion a five dollar bill and a twenty dollar bill gone, and in place thereof a ten dollar gold certificate substituted.

The answer then continuing was in the following words: "That having the money so missing in his pocket-book prior to the time said sums were so missed

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therefrom, there being no other person or persons present, or on the premises, who would or could so easily have taken the same as the plaintiff during the absence of the defendant from their said bedroom, this defendant, well knowing all these facts at and prior to the speaking of the defamatory words charged, and such facts and circumstances being such as would reasonably induce, in the mind of a person of ordinary intelligence and knowledge, a belief in the truth of the words alleged to have been spoken by defendant of and concerning the plaintiff, the defendant honestly believed that the plaintiff was guilty of taking his said money; and also at and prior to the time of the alleged speaking of the defamatory words charged, this defendant, in good faith, believed that the plaintiff was guilty of dishonestly obtaining the sum of money so missing; that by reason of the facts and circumstances hereinbefore set forth, the defendant, at the times alleged, was induced to and did believe in the truth of the charge that this plaintiff was guilty of the larceny of his said money, and was a dishonest person, and the defendant says that whatever he has said of or concerning the plaintiff was, at the time mentioned, uttered without malice, to those only to whom he at the same time communicated the facts, and who at the time understood him to refer solely to such facts defendant based his opinion on; that whatever offensive words he used were spoken in the full belief of their truth and verity, and not from any motive of malice toward the plaintiff."

The defendant was a witness in his own behalf, and testified, so far as it is material to say, as follows:

"I remember to have gone to Shafer's, as he testified. While there young Lyerly asked me, in Shafer's presence, if I was going to keep Wood all summer; told him no; that I had to watch my pocket-book too much; that I had missed money out of my pocket-book. I told them of the twenty dollar bill and the five dollar bill in my pocket-book the evening of the twenty-eighth

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day of February; that Wood and I had slept together that night; that I had changed pants and left the book in pants' pockets up stairs; that the house was all securely fastened; that after breakfast I thought of the book and went and found the two bills missing and the gold certificate substituted. I told them there was no other person could have taken the money. Went to see J. P. Brooks about working for me, and he asked me why I should not keep plaintiff. I then told him I had to watch my pocket-book too much, and gave him all the facts and circumstances of my losses substantially as he stated them to the jury."

The court gave the following instructions for the plaintiff:

"1. The court instructs the jury that under the pleading and the evidence in this case it stands admitted that the defendant spoke the words recited in the first count in plaintiff's petition, of and concerning the plaintiff, and they must find a verdict upon such first count for the plaintiff and assess his damages in such sum as they deem proper, and if the words were maliciously spoken, as elsewhere defined, exemplary as well as compensatory so that the plaintiff shall be compensated for his wounded feelings, the injury to his character and an example set to others, not to exceed, however, the sum claimed in said count."

"3. The court further instructs the jury that, although they may believe from the evidence that the defendant undertook to detail what he claimed to be the circumstances of the loss of his money, yet before that can be considered as in mitigation, they must believe from the preponderance of the testimony that he really so lost such money. And if they should so believe that he detailed the circumstances for the purpose of convincing his hearers that plaintiff was guilty, and injuring nis character, then the detailing of such circumstances cannot be considered in mitigation."

"4. Unless the jury should find from a preponder-

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ance of the testimony, that the defendant really lost the money claimed by him to have been lost in the manner described by him, they cannot consider any evidence touching such loss in mitigation of damages."

The court also instructed the jury for the plaintiff that the law presumed that the words charged in the petition, if spoken, were spoken maliciously, and that the law also presumed that the plaintiff was innocent of the crime imputed to him by said words.

CRITTENDEN, MCDOUGAL & STILES, for the appellant.

I. The court erred in giving the *first* and *second* instructions on the part of the plaintiff, telling the jury that the *speaking of the words* charged was *admitted*, and that they must find for the plaintiff. The answer *denies* the speaking of the words and pleads facts in mitigation. These pleas are not inconsistent. *Nelson v. Brodhack*, 44 Mo. 596; *Peters v. Ulmer*, 74 Pa. St. 402; Townshend on Slander, sect. 353; *McAdow v. Ross*, 53 Mo. 199; Bliss on Code Plead., sect. 392.

II. The answer denies the speaking of *all* the words; the defendant, in his evidence, does not admit the speaking of the only actionable words charged. In the justification the plea must be as broad as the charge; and where the speaking is denied, the words charged must be proved as alleged. Bliss on Code Plead., sect. 361; *Christal v. Craig*, 80 Mo. 367. And when any of the words are omitted in the proof, the omission is fatal, *unless* those proved were words containing the precise charge averred. *Lewis v. McDaniel*, 82 Mo. 577.

III. The court erred in *assuming* that the words charged were spoken; that they were spoken with *malice*, and instructing the jury upon that theory. In mitigation the defendant may set up the facts and circumstances, and allege and show his good faith in the belief that these facts and circumstances make out the

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offence charged. Bliss on Code Plead., sect. 360; *Spooner v. Keeler*, 51 N. Y. 527; *Hall v. Adkins*, 59 Mo. 144. It was solely the province of the jury to say what the facts proven were, and the court erred in taking the questions involved from the jury.

IV. The court erred in permitting a witness to testify as to *what he understood* from what defendant said. The meaning of defamatory words is to be determined by *the jury*, and evidence is not admissible to show in what sense a *witness* understood them. *Vanvechten v. Hopkins*, 5 Johns. (N. Y.) 211; *Snell v. Snow*, 13 Met. (Mass.) 278; *Rangler v. Hunewell*, 37 Pa. St. 130; *Briggs v. Byrd*, 11 Iredell, 353. In no case can the slanderous sense of the words spoken be determined by the understanding of the hearers where the language is *plain and direct;* it can only be allowed where the language is *ambiguous*. *Jernigan v. Fleming*, 43 Miss. 710; *McLaughlin v. Russell*, 17 Ohio, 475.

V. The court's direction to the jury that they *must* find exemplary damages, if they found that the words were maliciously spoken, was erroneous. Such damages cannot be claimed as a matter of right. Whether they shall be allowed or not, and their amount, are to be left to the discretion of the jury. 1 Sutherland on Damages, 742; *Snow v. Carpenter*, 49 Vt. 426; *Johnson v. Smith*, 64 Maine, 553.

VI. The court erred in instructing the jury that unless they found that defendant really lost the money "in the manner described," they could not consider any evidence in mitigation of damages.

RUSH & ALEXANDER, for the respondent.

I. The *admissions* in the answer, and the *teetimony* of defendant clearly justified the giving of the *first and second* instructions. It would have been an idle ceremony to have submitted to the jury as an issue, facts admitted by the pleadings and proof.

II. The words alleged by plaintiff to have been

spoken by the defendant, of and concerning him, as set out in the *first* count of the petition, being actionable *per se*, no proof of malice was necessary. The law implies it. *Hall v. Adkins*, 59 Mo. 144; *Weaver v. Hendrix*, 30 Mo. 502.

III. Where the defendant relies upon the *truth* of the defamatory matter as a defence, it must be pleaded in justification. The defendant did not attempt to justify by alleging or attempting to prove the truth of the defamatory matter. Bliss on Code Plead., sect. 361; *Wachter v. Querzer*, 29 N. Y. 547.

IV. The error, if any, in permitting the witness to testify as to h s understanding, was harmless, and did not prejudice defendant, as he does not claim that he was misunderstood. The meaning was unambiguous, and it would have been nonsense to have submitted to the jury the issue, whether or not, by the defamatory words, the defendant intended to charge plaintiff with larceny. 2 Starkie on Slander, 106. The evidence was admissible. *McLauhglin v. Russell*, 17 Ohio, 475; 3 Greenl. on Evid. (5 Ed.) sect. 417; Starkie on Evid., point 4, page 861.

V. The instruction as to exemplary damages does not tell the jury that exemplary damages *must* be awarded, but only to assess the plaintiff's damages in such sum as they *deemed proper*, and the verdict shows that the jury so understood it; and if the plaintiff was entitled to recover at all, the amount awarded him as damages is too small to support the inference that the jury applied the doctrine of smart money with much vigor, if at all.

VI. The loss of the money, and the manner of its loss made up the gist of defendant's mitigation. If defendant lost the money, and in the manner claimed by him, *and in good faith believed* plaintiff guilty of the larceny, then he was entitled to have the jury consider these facts in mitigation, and not otherwise; and the in-

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struction complained of cannot be understood as meaning other than this.

VII. No point is made, or error assigned, as to the giving or refusal of instructions on behalf of defendant. As taken in connection with those given on behalf of plaintiff, they presented the issues fairly to the jury.

HALL, J.—Under the pleadings the speaking of the words by the defendant did not stand admitted.

Under our code the defendant in an action for slander may in his answer deny the speaking of the words and justify; the denial and the justification are not inconsistent. Proof of one does not disprove the other; proving the truth of the words spoken does not prove the speaking of the words; and this is the test of inconsistency. Bliss on Code Pleading, sect. 344, and notes; *Nelson v. Brodhack*, 44 Mo. 596; *McAdow v. Ross*, 53 Mo. 199.

Applying the test to the answer in this case we do not find any inconsistency between the denial and the facts pleaded in mitigation; proof of such facts would not necessarily prove the speaking of the words charged in the petition, the speaking of the words not having been admitted by the answer was in issue.

In the language of the first instruction given for plaintiff did it stand admitted under the evidence that "the defendant spoke the words recited in the first count in plaintiff's petition?"

The only words charged in the petition, which it can with any reason be contended that the defendant admitted in his testimony he spoke, are, "I will not keep him (meaning the plaintiff) all summer for I have to watch my pocketbook too close." Conceding, for the purposes of this opinion only, that the defendant did admit that he spoke such words, what was the effect of such admission?

The petition charged the defendant with speaking of the plaintiff not only the words just referred to, but

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also the following words, "he stole fifteen dollars from me at one time and ten dollars at another." The speaking of the words being at issue under the pleadings, it devolved upon the plaintiff to prove the speaking of the words charged, or of such of them as contained the precise charge of slander averred. Proof of other words of substantially the same meaning as the words charged was not sufficient. *Christal v. Craig*, 80 Mo. 374; *Berry v. Dryden*, 7 Mo. 324; *Birch v. Benton*, 26 Mo. 154; *Lewis v. MacDaniel*, 82 Mo. 582; *Bunington v. Meeks*, 46 Mo. 220.

It was necessary that an admission made by the defendant of the speaking of any of the words charged should have been as broad and comprehensive as the proof required of the plaintiff, in order for the admission to relieve the plaintiff of such proof. Unless the admission was of the speaking of such of the identical words charged in the petition as of themselves constituted the slanderous charge the admission was not an admission of the speaking of the words charged in the petition, and did not relieve the plaintiff of the burden of proving the speaking of such words.

The words which the defendant admitted he spoke were not actionable *per se;* they did not of themselves standing alone impute the crime of larceny to the plaintiff. *Christal v. Craig*, *supra*. If extrinsic facts caused those words to so impute such crime they were actionable *per se;* but in such case it was necessary by prefatory averments to set out in the petition the extrinsic facts. It was not sufficient to make those facts appear by the innuendo, "for it is not the office of the innuendo to make averments, but to apply the words or explain their meaning." And had such extrinsic facts been averred in the petition it would have been necessary for the plaintiff to prove them. *Id.; Legg v. Dunleavy*, *supra*, and cases cited. The petition, had it alleged the speaking of only the words admitted by the defendant, would have been bad, because it contained no averments

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of the extrinsic facts necessary to make those words impute the crime of larceny to the plaintiff. The allegation in the petition that the defendant spoke such words was surplusage and amounted to nothing. The admission by the defendant that he spoke such words also amounted to nothing. Such admission did not relieve the plaintiff of the burden of proving the speaking of the other words charged in the petition, the only words which were actionable *per se*.

Plaintiff's right to recover rested upon the speaking by the defendant of him of the words, "he stole fifteen dollars from me at one time and ten dollars at another." Those words of themselves imputed the crime of larceny to the plaintiff. It devolved upon the plaintiff to prove that the defendant spoke such of those identical words as constituted a charge of larceny against the plaintiff. The defendant did not admit the speaking of any of those words in the answer or in his testimony. It was error for the court to instruct the jury that the speaking of those words was admitted under the pleading and evidence; and this error was not harmless, for the reason that the defendant did admit that he spoke the other words charged in the first count of the petition, because those other words did not impute the crime of larceny to the plaintiff.

The words laid in the first count of the petition, which we have said were actionable *per se*, were slanderous of themselves; and, if they were spoken as charged, the law implied malice; it was not necessary for the plaintiff to prove malice. *Hall v. Adkins*, 59 Mo. 148; *Pennington v. Meeks*, 46 Mo. 220. The court properly so held, and properly refused to instruct the jury that unless they found from the evidence that the words were spoken maliciously they should find for the defendant.

If the slanderous words were spoken by the defendant, the plaintiff was entitled to recover as damages a fair and reasonable compensation for the injury naturally and probably done to him thereby, whether the

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defendant spoke the words with malice in fact or not. *Pennington v. Meeks, supra; Lanius v. Druggist Ac. Co.*, 20 Mo. App. 12; *Weaver v. Hendrick*, 30 Mo. 502; *Buckley v. Knapp*, 48 Mo. 162; *Birchard v. Booth*, 4 Wis. 95; *Klinck v. Colley*, 46 N. Y. 438.

And, without proof of actual malice, the jury were at liberty to give the plaintiff such exemplary damages as they might have believed it proper for them under all the circumstances of the case to impose as a punishment upon the defendant. *Id.*

The first instruction given for the plaintiff seems open to the verbal criticism, that by it the jury were told that if they found for the plaintiff they must find exemplary damages. The instructions should, upon a new trial, make it clear to the jury that they may or may not find exemplary damages as they may think right under all the circumstances of the case.

The court gave the defendant more than the law, when it instructed the jury, that, unless they found that the defendant spoke the words maliciously, they should find for the plaintiff *only nominal* damages.

The counsel for the defendant contend that, if the facts specially pleaded by the defendant are true, the plaintiff ought to recover nothing in this case. The contention is based upon the idea that those facts constitute not mere mitigation but justification. *Hall v. Adkins* (*supra*) and *Pasley v. Remp* (22 Mo. 407), are cited in support of such contention.

In each of those cases slanderous words were spoken by the defendant, of the plaintiff, charging the latter with larceny, and the facts upon which such charge was made were stated at the time the words were spoken, and those facts showed that the charge was not true. In those cases it was held, if the defendant honestly believed that the facts and circumstances attending the taking of the property constituted larceny, and so believing and without malice he spoke the words charged only to those to whom he communicated the facts con-

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stituting in his opinion the crime charged and upon which he based the same, that then the plaintiff could not recover, because the defendant had sent an antidote along with the poison and had shown a mistaken view of the law rather than a malicious purpose.

Those cases are based upon the facts narrated by the defendant at the time he spoke the slanderous words and in connection therewith showed that the plaintiff was not guilty of the crime charged. Those cases do not support the contention made for the defendant here, because the facts pleaded by the defendant, if true, tended to show that the plaintiff was guilty of the crime charged. For the very reason that the facts in the cases cited constituted justification, the facts pleaded by the defendant in this case do not constitute justification. The facts in those cases were an antidote for the poison of the slander; the facts in this case give an additional strength to the poison of the slander. The use of the word preponderance in an instruction has been criticised by the supreme court of this state, and has been held to be reversible error by this court in one case where the circumstances were peculiar. *Carson v. Porter*, 22 Mo. App. 185. It would be well upon a a new trial for the court not to use such word in its instructions.

Except for the use of the word "preponderance" in the fourth instruction given for the plaintiff we perceive no error in that instruction. Having pleaded the facts which he claimed mitigated his wrong, the defendant was bound by the facts thus pleaded. He was entitled to no benefit from any other mitigating facts. If the facts as pleaded were true, if the defendant lost his money under the circumstances stated, if he was induced thereby to believe and in good faith did believe that the plaintiff stole his money, and if he so stated without actual or express malice, he was entitled to have the jury consider all those facts in mitigation, in determining whether they ought to give any, and, if any, what exemplary damages. But

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if the defendant did not lose his money at all, or if he did lose his money, but not substantially in the manner and under the circumstances pleaded, he was not entitled to have the jury consider any facts in mitigation. He was not entitled to have the jury consider the facts pleaded, because they were not true, and not other and different facts because they were not the facts pleaded. Besides, the least punishment that should be imposed upon the defendant for pleading facts as true, that were not true, which, if true, had a tendency to establish the plaintiff's guilt of the crime imputed by the slanderous words, is that no facts should be considered in mitigation of his wrong.

The same may be said in relation to the third instruction given for the plaintiff. And as to that instruction we may add that although the facts pleaded might have been true, and although the defendant might have believed in good faith that the plaintiff stole his money, still, if the defendant spoke the words charged for the purpose of injuring the plaintiff, the defendant was not entitled to have those facts or his belief based thereon considered in mitigation.

The court instructed the jury that the law presumed the plaintiff was innocent of the crime imputed to him by the words charged in the petition. Objection is made here to that instruction. Not only was the instruction proper, but under the pleadings the innocence of the plaintiff was not in issue. Bliss on Code Pleading, sect. 361.

In conclusion we may add this. It may be, and doubtless is true that the jury under the evidence would have found that the defendant spoke the words charged in the petition. But the speaking of the words was an issue of fact, and upon that issue the defendant was entitled to the opinion of the jury.

For the error indicated the judgment is reversed and the cause remanded. Ellison, J., concurs; Philips, P. J., not sitting.

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JAMES H. SPOONER, Respondent, v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

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87	685
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48	145
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71	391
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85	48
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99	*623

Kansas City Court of Appeals, November 22, 1886.

1. COMMON CARRIERS—BAGGAGE—MEANING OF TERM.—What is, and what is not *baggage*, depends upon the circumstances of each individual case; upon the length of the journey; the purpose for which it is made; the position in life and occupation of the traveler; the mode of conveyance, and the character of country through which he intends to pass. Anything may be carried as personal baggage which travelers usually carry for their personal use, comfort, instruction, or amusement, having regard to the circumstances enumerated. But articles carried *for sale* are not baggage, without regard to what the articles may be.

2. PRACTICE—NEW TRIAL—CASE ADJUDGED.—Where the verdict, as in this case, so far as regards certain articles carried by the plaintiff for sale, was absolutely without proof to support it, and was against a sworn admission made by the plaintiff, the court should have granted a new trial. But as to the valise, and the articles contained in it which were properly baggage, the plaintiff can recover.

3. DAMAGES—MEASURE OF—CASE ADJUDGED.—In this case the value of the property lost, which was baggage, with interest, was the correct measure of damages. If the property had a market value, then the market value, otherwise the value of it for use to the plaintiff. 3 Sutherland on Damages, 293.

APPEAL from Jackson Circuit Court, HON. F. M. BLACK, Judge.

Reversed and remanded.

Statement of case by the court.

This was an action against the defendant as a common carrier of passengers. The petition alleged that the defendant as such carrier received the plaintiff as a passenger, together with one valise as baggage, to be safely carried to Liberty, Missouri, and that the baggage was to be there delivered to the plaintiff. The petition al-

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leged a failure on the part of the defendant to deliver the baggage, and further alleged "that by reason of the loss of the goods aforesaid plaintiff's time was taken up and engaged at the request of defendant's agent in a fruitless attempt to find the said goods." The baggage was alleged to have been of the value of $46.90. The petition also alleged "that by reason of the loss of goods aforesaid and his inability to find or get any trace of their whereabouts he was deterred from prosecuting his work; was detained both at Liberty, Missouri, and Kansas City, with great outlay of time, expense, and attorney's fees, occasioned by loss of the goods aforesaid, and that by reason of the premises aforesaid the plaintiff was injured to his damages $96.90, for which amount no part has been paid. Wherefore plaintiff prays judgment for said sum of $96.90, with costs."

The plaintiff himself testified. The plaintiff and a fellow passenger, who testified for plaintiff, were the only witnesses. The defendant introduced no evidence.

From the plaintiff's own testimony it appeared that he purchased a passenger's ticket from defendant, good for a passage from Kansas City to Liberty. The plaintiff was "a street auctioneer," and was going to Liberty to sell goods. The plaintiff checked as his baggage two trunks and the valise in controversy. The plaintiff was not asked by the baggagemen as to the contents of the valise, neither did he make any statement as to such contents. The baggageman charged the plaintiff thirty-five cents on account of excessive baggage, which sum the plaintiff paid.

As to the contents of the valise the plaintiff made the following statement:

"I lost in my valise the following articles: Two shirts, worth $4.50; pair of drawers, 75c; two pair of socks, 75c; undershirts, $1.25; collars, 60c; cuffs, 70c; razor strop, $1.00; shaving brush, 50c; valise, $5.00; shoe latches, $4.00; lead pencils, $6.00; silk handker-

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chiefs, $8.00; sleeve buttons, $3.00; rings, $3.75; lockets, $4.00. The contents were worth at least $46.90."

In relation thereto the plaintiff also testified as follows on cross-examination:

Q. "What goods had you for sale?"

A. "I had a line of notions."

Q. "How did you get them there?"

A. "Most of them came by express, and the remainder was in one of my trunks."

Q. "Was your trunk lost?"

A. "No sir, trunk wasn't lost."

Q. "Any goods in valise?"

A. "There were goods in the valise."

Q. "Were the lockets and the goods that were in the valise for sale?"

A. "They were."

Concerning his loss of time, the cause thereof, and the damages sustained by him in consequence thereof, the plaintiff testified as follows:

"When I arrived in Liberty I went to the baggage car to get my valise. The two trunks were there, but the valise was missing. I asked Mr. Whiting, the agent, if he could get my valise on the morning train, because I wanted some clean clothes. I returned to the depot in the morning and Mr. Whiting said that he had asked the baggage master in Kansas City if my valise was there. Whiting said they had the number of the check on record, but had no railroad receipt, and that they expected that it had went out on some other road, but could not tell which road; but would try and trace it as soon as possible. Mr. Whiting told me to remain in town and that he might get it in the meantime. I remained here four days waiting for my valise. I then gave my check to American Express Company. The agent's name was Charles Whiting. I told him as soon as my valise arrived to send it to me by express to Carrollton, Missouri. I remained in Carrollton about ten days. Did not hear anything of my valise. I was damaged fifteen

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dollars by my expenses for hotel bills for four days in Liberty. I was also damaged about ten dollars while in Carrollton ten days. I was damaged by loss of time at least twenty-five dollars before I quit hunting for my valise."

For the plaintiff the court gave the following instructions:

"1. The court instructs the jury that a common carrier of passengers, by receiving the baggage of a traveller who has engaged passage, becomes immediately responsible for its safe delivery at the place of destination, and nothing but the act of God, such as lightnings, earthquakes or tempests, being such acts as the prudence or foresight of man could not see or prevent, or the acts of the public enemy will excuse such delivery."

"2. The court instructs the jury that the term baggage includes a reasonable amount of money in a trunk intend for traveling expenses and such articles of necessity and convenience as are usually carried by passengers for their personal use, instruction, amusement or protection."

"3. The court instructs the jury that if they find for the plaintiff in this case, in assessing his damages they may include the value of all such articles of necessity and convenience as are usually carried by passengers for their personal use and comfort, instruction and amusement, or protection, having regard to the object and length of the journey in question, and which are shown by the evidence to have been lost by the defendant, if any such loss has been shown, and may assess as damages expenses incurred by plaintiff in seeking to find the baggage, if such expenses were incurred at the request of defendant's agent."

There was a verdict and judgment in favor of plaintiff for $96.90.

STRONG & MOSMAN, for the appellant.

I. The case was tried on a wrong theory, both of

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law and of fact. The valise and contents were not baggage. Defendant's baggageman did not have notice or knowledge, nor reason to suspect that the valise contained merchandise at the time he gave check for it, and did not contract to carry it as baggage. Hutchinson Carriers, sect. 679; *Railroad v. Marcus*, 38 Ill. 219; Thomp. on Carr. Pass., 510; *Railroad v. Carrow*, 73 Ill. 348; *Blumantle v. Railroad*, 127 Mass. 322; *Haines v. Railroad*, 29 Minn. 160.

II. The court erred in instructions given at request of plaintiff. Cases cited, *supra*. *Dunlap v. Steamboat Co.*, 98 Mass. 83. Hotel bills incurred in searching for lost baggage are not proper to be allowed as damages. *Morrison v. Railroad*, 2 Pugsley (N. B.) 295; *Railroad v. Kennedy*, 41 Miss. 671.

III. The court erred in refusing instructions prayed by defendant. By reason of the fraud of plaintiff defendant was released from the higher obligaton of common carriers. *Railroad v. Marcus*, 38 Ill. 219.

IV. The court erred in overruling motion for new trial. The verdict and judgment are wholly unsupported by the evidence, and are against the evidence and admissions of the plaintiff. *Callahan v. Warne*, 40 Mo. 137.

ROBERT T. HOLT, for the respondent.

I. The valise and contents were baggage. What is baggage is a question for the jury. *Railroad v. Swift*, 12 Wall. (U. S.) 262; Lawson Carriers, sects. 50 and 187; *Brook v. Pickwick*, 4 Bing. 218; *McGill v. Holland*, 3 Barr (Pa. St.) 451.

II. Instructions asked by plaintiff, numbered one, two and three, were properly given. (1) As to instruction numbered one, carrier's liability for loss fixed by law. Sect. 804, Rev. Stat. Mo.; *Coggs v. Bernard*, 2 Lord Raymond, 918; *Powell v. Myers*, 26 Wendell (N. Y.) 591. (2) As to instruction number two, as to what is baggage. Cases cited *supra*; *Dexter v. Railroad*, 42

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N. Y. 326; *Hutchings v. Railroad*, 25 Georgia, 63. (3) As to instruction number three, on measure of damage for loss. *McDonald v. North*, 47 Barb. (N. Y.) 530; *Railroad v. Moore*, 40 Miss. 39; *Priestly v. Railroad*, 26 Ill. 205; *Burt v. Bank*, 1 Disney (Ohio) 32.

III. The proposition that "fraud avoids all contracts," is not applicable in this case. Failure of defendant to deliver baggage, when inquired for by passenger, a presumption of *negligence* at once arises, and upon that *question* the case stands—not *contract*. *Vanhorn v. Kesmet*, 4 E. D. Smith (N. Y.) 453; *Garvey v. Railroad*, 1 Hilton, 283; *Mars v. Railroad*, 7 Eng. D. & E. 519.

IV. The court properly refused instructions prayed by defendant. *McGill v. Rawlan*, 3 Pa. St. 451; *Jones v. Voorhees*, 10 Ohio, 145; *Bank v. Brown*, 9 Wend. (N. Y.) 85; *Gibbon v. Paynter*, 4 Burr (Eng.) 2298.

V. The receipt of extra pay by defendant makes it liable for safe delivery, whether goods or baggage. Coke on Littleton, 89*a*; *Coggs v. Bernard*, *supra*.

VI. The court properly overruled motion for new trial. The verdict and judgment properly awarded to plaintiff. *Brooke v. Pickwick*, 4 Bing. 218.

I.

HALL, J.—At the beginning it may be well for us to say that the judgment rendered in this case can be upheld only on the ground of the defendant's liability as a common carrier of passengers for the loss of the valise and its contents as baggage. This is true, not only because the petition based the defendant's liability upon such ground, but also because the evidence failed to establish any liability against the defendant upon any other ground. It is true that the plaintiff did testify to the payment by him of a charge made by the baggageman of thirty-five cents for the transportation of the two trunks and valise, but that charge was for extra baggage

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and not for merchandise. The payment of such charge entitled the plaintiff to have the articles with him carried as baggage without regard to the amount of them, but such payment did not give to the plaintiff the right to have articles, not properly baggage, carried as baggage in any amount. The payment of the charge was made wholly on account of the excess in the amount of the articles and not at all on account of the character of the articles.

So far as the rights and liabilities of the parties depended upon the character of the articles they were not affected by the payment of the charge. Thompson's Carriers of Passengers, 522.

In the case it appeared, too, that the defendant did not know the contents of the valise. So we repeat that, under the petition as well as the facts in evidence, the judgment in this case rests upon the defendant's duty to carry the valise and its contents as baggage.

II.

The word "baggage" has a well defined, technical, legal meaning and we presume, therefore, that the word was used by the legislature in section 804, Revised Statutes, in accordance with such meaning. *State ex rel. v. Leffingwell*, 54 Mo. 471. The meaning of the word is in no wise altered or changed by the statute. The question as to what constitutes baggage is a mixed question of law and fact, but if the facts are all admitted the question is one purely of law. Hutchinson on Carriers, sect. 688.

It has been said that, "It is, of course, impossible to give any general rule which will be equally applicable to all cases for the determination of what is and what is not properly baggage. This depends to a very great extent upon the circumstances of each individual case, upon the length of the journey, the purpose for which it is made, the position in life and occupation of the

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traveller, the mode of conveyance and the character of the country through which he intends to pass. The adjudicated cases on this subject justify the statement that any thing may be carried as personal baggage which travellers usually carry for their personal use, comfort, instruction or amusement, having regard to the circumstances enumerated above." Thompson's Carriers of Passengers, 510.

But the books are all agreed that articles carried for sale are not baggage without regard to what the articles may be. Hutchinson on Carriers, sect. 685; Thompson's Carriers of Passengers, 511, 512. Articles which, under other circumstances, would be baggage, when carried for sale are not baggage.

The plaintiff testified that certain articles contained in the valise were carried by him for sale. Those articles were not baggage.

It would have been better for the trial court, instead of the second instruction given for the plaintiff, which was a mere abstraction, to have instructed the jury as to what constitutes baggage, in relation to the facts in evidence.

As an abstract statement the instruction was, no doubt, correct. But nowhere were the jury told that articles carried for sale are not baggage. And from that instruction and the third instruction given for the plaintiff the jury must have inferred that if the articles carried in the valise were "such articles of necessity and convenience as are usually carried by the passengers for their personal use and comfort, instruction and amusement, or protection, having regard to the object and length of the journey," they are baggage although carried for sale.

It would seem that the jury made such inference because they found that all the articles contained in the valise were baggage in the face of a sworn statement made by the plaintiff that certain of the articles were carried for sale.

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But if the jury did not make such inference their verdict, in so far as concerns the articles carried by the plaintiff for sale, was absolutely without proof to support it and was against a sworn admission made by plaintiff. For this reason the court should have granted a new trial. As to the other articles the evidence warranted the verdict, but as to the articles carried for sale the verdict was against the plaintiff's admission made as a witness, which was as binding upon him as if it had been made in the pleadings. As a matter of law the articles carried for sale were not baggage.

III.

We are asked to hold, because the valise contained articles which were not baggage without the defendant's knowledge, that the plaintiff cannot recover for the valise and the articles contained in it which were properly baggage.

We do not so hold. As to the articles not properly baggage the plaintiff under the petition and facts cannot recover; but as to the valise and the articles contained in it which were properly baggage the plaintiff can recover. 3 Sutherland on Damages, 293; *Railroad v. Fraloff*, 100 U. S. 31.

IV.

The value of the property lost, which was baggage, with interest was the correct measure of damages; if the property had a market value, then the market value, otherwise, the value of it for use to the plaintiff. Sutherland on Damages, *supra.*

The expenses incurred by the plaintiff were too remote. Besides there was no evidence that the plaintiff sought the baggage, or that he made such search at the request of defendant's agent.

Judgment reversed and cause remanded. Ellison, J., concurs; Philips, P. J., absent.

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J. G. FURBER, Appellant, v. T. CONWAY ET AL., Respondents.

St. Louis Court of Appeals, November 23, 1886.

APPELLATE PROCEDURE—MOTION FOR NEW TRIAL—EXCEPTIONS.—It is essential that the bill of exceptions preserve the motion for a new trial where the matters sought to be reviewed on appeal are matters of exception.

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Affirmed.

F. A. C. MACMANUS, for the appellant.

F. A. WIND and W. A. BODLEY, for the respondents.

LEWIS, P. J., delivered the opinion of the court.

This was an application for a restraining order to prevent the selling of personal property under an execution by a constable. A temporary injunction was granted, and upon the final hearing this was dissolved and judgment wa rendered for the defendants.

The bill of exceptions contains no motion for a new trial, nor any statement that one was filed. Under the uniform rulings of the supreme court, and of this court, we are, therefore, precluded, from any examination into the merits of the controversy. Outside of the bill of exceptions, no point is saved for our attention, and the judgment must be affirmed. *Rotchford v. Creamer*, 65 Mo. 48. All the judges concur.

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W. T. McGinnis, Respondent, v. R. A. Barnes, Appellant. 23 413 / 43 489

St. Louis Court of Appeals, November 23, 1886.

1. Corporations—Stockholders—Right of Action Against.—The creditor of a dissolved corporation has a statutory cause of action against a stockholder, to the extent of the latter's unpaid stock, which accrues when his right to proceed against the corporation accrues.

2. ——— Limitations.—The capital stock being a trust fund for the benefit of creditors, a creditor of the corporation may have a subsisting cause of action against a stockholder for unpaid stock, although the corporation be barred by limitation to enforce the liability in a direct proceeding.

Appeal from the St. Louis Circuit Court, W. H. Horner, Judge.

Affirmed.

Smith P. Galt, for the appellant: There is no privity of contract between the appellant and the respondent. The appellant owed the respondent nothing. *Donnelly v. Hudson*, 13 Mo. App. 15. The indebtedness of the appellant to the company matured at once upon the company's dissolution, and upon the maturity of the indebtedness, the statute of limitations began to run in the appellant's favor, as to his liability therefor. *Henry v. Railroad*, 17 Ohio, 187; *Hatch v. Dana*, 101 U. S. 205; *Larkin v. Willi*, 12 Mo. App. 138; *Garesche v. Lewis*, 15 Mo. App. 571; *Donnelly v. Hodson*, 13 Mo. App. 15; *Baker v. Bank*, 9 Met. 195.

M. Kinealy and J. R. Kinealy, with R. M. Foster, for the respondent: The statute of limitations began to run from the maturity of the coupons, and not from the dissolution of the corporation. *Lindsay v. Hyatt*, 4

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Edw. Ch. 99; *Bank v. Greene*, 17 N. W. Rep. 86; 20 N. W. Rep. 754; Thompson on Stockholders, sect. 290.

Lewis, P. J., delivered the opinion of the court.

The St. Louis County Railroad Company was a duly organized corporation which, in 1877, as the testimony tended to prove, became insolvent and ceased to do business, when all its property was sold. The defendant was, and still is, the owner of ten shares of the capital stock of the company, of the par value of one hundred dollars per share, of which forty-five dollars remains unpaid, on each share. The plaintiff is owner of six interest coupons of thirty-five dollars each, issued by the company, which were due and payable, respectively, on October 1, 1880, April 1, 1881, October 1, 1880, April 1, 1880, October 1, 1879, and April 1, 1876. This suit was commenced before a justice of the peace on June 3, 1885, to hold the defendant liable, under Revised Statutes, section 745, as a holder of unpaid stock, for the debt of a dissolved corporation. On the defendant's appeal, the plaintiff obtained a judgment in the circuit court for $139.02.

The defence was limitation, and the only question in the case is, whether the statute began to run at the time when the corporation was dissolved, or at the time when the coupons became due and collectible. In the first alternative, the judgment should be for the defendant; in the second, for the plaintiff.

It is, of course, well understood that the dissolution of a corporation does not imply its lapse into nonentity for every purpose. Means are always provided, or capable of being provided, under the law, for the compulsory collection of its dues in liquidation. There is generally little or no uncertainty about the time when the statute of limitations begins to run, because our statute places it, in all cases of contract, at the date when the right of action accrues. The difficulty in the present case arises from the fact that two separate rights of action upon the same demand against the defendant have accrued at dif-

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ferent times. The right of action upon his unpaid stock account accrued in favor of the corporation at the time of its dissolution. The right of action created by statute in favor of the plaintiff, on the same unpaid stock account, did not accrue until the coupons became payable. We must determine which of these two events shall control the status of the present action. The plaintiff claims that the only test is as to the time when the right of action accrued *in his favor*. The defendant insists that the true test is, as to the time when the right of action accrues *against him*.

A natural inquiry here may be, *for whom* are statutes of limitation enacted? One answer is: For the *public*—having in view the maxim: "*Interest Reipublicae ut sit finis litium.*" But this answer furnishes little light for our inquiry, since the plaintiffs and the defendants are supposed to be alike interested in the public welfare. On several grounds, however, it may be said that, as between the parties to an action, the statute has the *plaintiff* and his status for its special objects. It operates a restraint upon him, forbidding him to exercise the common right of demanding legal redress, after a certain length of time has passed. The justice of the statute is defended on the ground that the plaintiff by making no demand during a long lapse of time, has virtually admitted his consciousness that he had not a just claim against the defendant. When the statute operates, it destroys in the plaintiff's hands an inchoate value which, by earlier action, he might have made consummate. The argument to be drawn from these and similar considerations is, that the effect of the statute is to be dated from the time when it fastens upon the plaintiff and his rights, in a given case. And, as we find that, as to some of the coupons sued on, the plaintiff's right of action had not accrued five years before the institution of the present suit, by reason of their non-maturity, the restraining influence of the statute can not be brought

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to bear upon him, and he is, therefore, entitled to his remedy.

On the other hand, something may be said in favor of a different view of the statute and its objects. English and American courts have never ceased to declare that statutes of limitations are statutes of *repose*. Repose for whom? Certainly not for the plaintiff in a case. For, if the statute there operates at all, it effects his serious discomfiture. It is the defendant who finds the repose, in the release from the plaintiff's pursuit. The statute creates a *defence*, and for whom can that be provided but for the defendant? For the debtor who has paid and discharged his obligation, but who, by the loss of his receipt, or the death of a witness, is deprived of all proof of the fact, the statute fixes a day when he may feel himself forever free from the demand, notwithstanding his loss of the proofs, which were his sole dependence for its defeat. The defendant may claim, too, an identity of interest in the statute with that of the public, since he is peculiarly benefitted by the "end of litigation."

It thus appears that much may be said on either side of the question, as it is presented by learned counsel in their briefs. But there is another consideration, wholly apart from all these views, which, as we think, must control the determination of this cause. If there were no joint stock corporation in the case, the weight of the argument might be in favor of the defendant. But it is not now questioned anywhere, that the capital stock of a corporation is a trust fund for the benefit of the corporation's creditors. When any part of the stock remains unpaid for in a stockholder's hands, he is the trustee, holding for the objects of the trust so much of the fund. When a person subscribes for stock and leaves the whole or a part unpaid, he takes upon himself, to that extent, a trusteeship which brings him in privity with the creditors, present or future, of the corporation, until all their claims are satisfied, or until he has discharged his obli-

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gation for the stock unpaid. Hence, we are bound to consider the statute of limitations as it affects the relations between the stockholder and the creditor, and not as it affects the relations between the stockholder and the corporation. In the former relations, the statute has no bearing on the rights of the creditor, until a right of action accrues upon his demand, which event, in this case, occurred at the dates, respectively, of the maturing of his coupons in suit. Three of the coupons sued on had matured within five years before the commencement of the suit, and the judgment of the circuit court appears to have been rendered on that basis.

With the concurrence of all the judges, the judgment is affirmed.

MARY CALDWELL, Appellant, v. JOHN SILVA ET AL., Respondents.

St. Louis Court of Appeals, November 23, 1886.

GARNISHMENT—CONDITIONAL CONTRACTS—BURDEN OF PROOF.—In garnishment proceedings, in order to render the garnishee liable on a conditional promise, the plaintiff must show both the promise and the fulfillment of the condition.

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Affirmed.

BROADHEAD & HAEUSSLER, for the appellant.

COLLINS & JAMISON, for the respondents.

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LEWIS, P. J., delivered the opinion of the court.

The plaintiff had execution on a judgment for $945.50 against Henry G. Farber, and caused the defendants to be summoned as garnishees. Issues were made up, and it appeared in the trial, that on July 22, 1885, Farber was the holder of a ten-year lease on certain city property, running from September 15, 1880, to September 15, 1890. That on the day first above mentioned, Farber agreed orally with the defendants for a transfer of the lease, and gave to them the following instrument:

"Received of Joseph Gazzolo and John Silva the sum of one hundred dollars ($100) on account of sale of all my right, title, interest, and good will to the leasehold of the property situated on southeast corner of Olive street and Ware avenue in the city of St. Louis. I further agree to deliver up possession of the said premises to the said Joseph Gazzolo and John Silva, on or before August 10, 1885, and the said Joseph Gazzolo and John Silva agree, when they receive possession of said premises, to pay to me in cash five hundred dollars, being the balance of the amount of sale. And I further agree, at the option of the said Gazzolo and Silva, to rent and become a tenant of theirs; the rent of rooms which I occupy to be determined upon between the said Joseph Gazzolo and John Silva, and me.

"HENRY G. FARBER.

"ST. LOUIS, July 22, 1885."

The testimony tended to show that the defendants never entered into possession of the premises; that Farber remained in possession, and about a month after the alleged transfer, posted "for rent" bills on the premises; and that in November next following, his lease was cancelled by his landlord.

The defence was the statute of frauds. The plain-

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tiff insists that no memorandum in writing was necessary to bind the defendants, because there was an absolute and executed sale and transfer of the lease to them, whereby they became bound to pay the purchase money; citing *Tatum v. Brooker* (51 Mo. 148), and other cases. *Tatum v. Brooker* is the only one of them in point, and it settles the law directly against the plaintiff's claim. There the vendee took possession and worked the property as his own under the contract of purchase, and appropriated the proceeds to his own use. Having thus got the full benefit of his purchase, he could not be heard to repudiate it for want of a writing. There was such a part performance as took the case out of the statute of frauds. But in this case the vendees got nothing whatever. They were never put into possession, and the only issue of the contract, as to them was, that they were out of pocket one hundred dollars without any return. Moreover, by the very terms of the contract, they were only to pay the additional five hundred dollars upon receiving the possession; and, as they never did receive the possession, and there was no attempt to prove that it had been tendered to them, the defendants never became liable to pay, even without any reference to the statute of frauds.

The judgment is affirmed with the concurrence of all the judges.

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OTTO MOSER, Assignee, v. C. CLAES ET AL., Appellants; INTERNATIONAL BANK, Respondent.

St. Louis Court of Appeals, November 23, 1886.

1. **FRAUDULENT CONVEYANCES—MORTGAGES AND DEEDS OF TRUST.—A mortgage of a stock in trade is fraudulent in law as to the mortgageor's creditors, where the mortgageor, at the time, reserves the right to continue to buy and sell and otherwise deal in the property as he had theretofore done.**

2. **——— GENERAL ASSIGNMENT—RIGHTS OF ASSIGNEE.—The assignee of mortgaged property occupies the former position of the assignor, and his admission that he holds the property subject to the mortgageor's rights, is not equivalent to constructive delivery of possession.**

3. **——— STATUTE OF FRAUDS—DELIVERY OF POSSESSION.—The delivery of possession which will cure the fraud in a mortgage to the mortgageor's use must be actual delivery and change of possession.**

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Reversed and remanded with directions.

KEHR & TITTMAN, for the appellants: The mortgageor was to remain in possession and conduct the business which rendered the mortgage void. *Sheppards v. Turpin*, 3 Gratt. 373; *White v. Graves*, 68 Mo. 220; *Goddard v. Jones*, 78 Mo. 518; *Stanley v. Bunce*, 27 Mo. 269; *Billingsley v. Bunce*, 28 Mo. 547; *The State v. Mueller*, 10 Mo. App. 87. The agreement and understanding between the bank and Leisse at the time of the execution of the mortgage, as testified to by Mr. Lange, made it a conveyance to the use of the grantor. *Weber v. Armstrong*, 70 Mo. 217; *Reed v. Pelletier*, 28 Mo. 177. The mortgage, being fraudulent and void as against appellants, who were judgment creditors of Leisse, the property conveyed by it to the bank never passed to the

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assignee, Moser, under the deed of assignment, but against them remained the property of Leisse. Burrill on Assignments [4 Ed.] p. 151, sect. 110; *Estabrook v. Messersmith*, 18 Wis. 551; *Heinrich v. Woods*, 7 Mo. App. 236, 230.

F. A. WISLIZENUS and LOUIS GOTTSCHALK, for the respondent: A mortgage to secure indefinite future advances is good. *Foster v. Reynolds*, 38 Mo. 556; *Ackermann v. Hunsicker*, 85 N. Y. 43; *Shiras v. Caig*, 7 Cranch, 34; Jones on Chattel Mortgages, sect. 95. This mortgage does not, on its face, necessarily imply a power of sale in the mortgageor. *Hewson v. Tootle*, 72 Mo. 635; *Weber v. Armstrong*, 70 Mo. 220, approved in *The State v. Cooper*, 79 Mo. 464. The fact that the mortgageor sells, with the acquiescence of the mortgagee, does not of itself render the mortgage necessarily fraudulent. *Hewson v. Tootle*, 72 Mo. 635. Even though the mortgage were fraudulent, the mortgagee acquired possesion before the creditor levied; the mortgagee is, therefore, entitled to hold as against the creditor. *Greeley v. Reading*, 74 Mo. 309; *Nash v. Norment*, 5 Mo. App. 545; *Cameron v. Marvin*, 26 Kan. 612; *Read v. Wilson*, 22 Ill. 377.

ROMBAUER, J., delivered the opinion of the court.

The plaintiff, Moser, filed his petition stating that he had a fund of four thousand dollars in his hands as assignee of one Leisse. That the entire amount of such fund was claimed by the International Bank as proceeds of property mortgaged to it by his assignor, and that $2027.32 and interest parcel of said fund was claimed by Claes *et al.*, by virtue of a judgment and execution against Leisse, and the attachment by garnishment of him, the said Moser, under said execution. The petition prayed for an order requiring such rival claimants to interplead.

The court sustained the prayer, whereupon the plain-

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tiff paid the money into court and was discharged. The claimants filed their respective claims to said fund, and the court upon hearing decreed the entire fund to the International Bank, whereupon Claes *et al.*, prosecute this appeal.

Touching the facts of the case there is no substantial dispute. It is conceded that the bank holds a valid claim against Leisse for an amount exceeding the entire fund in controversy, and that such claim arises out of Leisse's liability to the bank, secured, or intended so to be, by the mortgage hereinafter referred to. The judgment of the trial court, therefore, is correct, unless such mortgage, under the admitted facts of the case, was and is fraudulent in law as against Claes and others, creditors of Leisse.

The mortgage bears date April 13, 1879, and was duly recorded. It purports to convey to the bank all the engines, machinery, and fixtures, tools, and appurtenances of a certain box factory, and the lumber and stock on hand belonging thereto, also such other lumber or stock on hand, and engines, machinery, fixtures, and tools which might be acquired by said Leisse thereafter in the prosecution of the box factory business. Also, two horses and wagons.

At the time of the execution of the mortgage it was agreed between Leisse and the bank, that he was to continue and remain in possession of the property described in the mortgage, and that he was to continue to do the business of the factory as before, and deal with the property as if it were his own. He continued to do so until he made the assignment hereinafter mentioned.

Leisse made a general assignment of all his property, including the property mortgaged, July, 14 1884, to Moser, who immediately thereafter took possession of it. The president of the bank learning of this assignment, called upon the assignee, informed him of the mortgage and claim of the bank on the property, and

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requested him to run the business as heretofore, which the assignee assented to.

The assignee thereafter applied to the court for leave to sell the box factory with all its stock in bulk, and by order of the court he did so sell it, realizing upon such sale four thousand dollars, which he deposited in the bank in his own name as a special deposit.

The appellants, Claes *et al.*, at the date of the assignment, were creditors of Leisse, and October 13, 1884, recovered a judgment against him on their claim for $2,027.32 and costs. They caused an execution to be issued on such judgment and caused the assignee, Moser, to be garnished on such execution.

Prior to the recovery of their judgment, they had presented their claim to the assignee for allowance, and it was allowed for $2,020.32. On this allowance the assignee paid them, November 10, 1884, a dividend of $405.86. This dividend, as the case finds, was paid out of the proceeds of certain assigned accounts and not out of proceeds of the mortgaged property.

August 1, 1884, the bank filed a petition in the assignment proceedings, praying for an order of court upon the assignee to pay to it the four thousand dollars proceeds of sale of the mortgaged property. August 20, 1884, the court made an order requiring the assignee to notify each creditor of Leisse to file objections with the assignee, within twenty days after his claim is established, whether he desired to contest the exclusive claim of the bank to this fund, and granted leave to the assignee to deposit the proceeds of the sale with the bank, on condition that if any creditor took action disputing such claim of the bank before October 1, 1884, the bank would return the fund. Notice of this order was served upon Claes *et al.*, August 30, 1884. Their claim was established before the assignee September 25, 1884, and the assignee was garnished on their execution October 13, 1884, within twenty days after their claim was established by allowance.

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The parties upon the trial of the cause entered into the following stipulation:

"It was agreed that the appraisement, filed in the assignment proceedings of Leisse, of the property covered by the mortgage, represented the true value of said property; that said value was $5,404.25, of which sum the sum of $2,129 represented the value of the materials and stock in trade, and the remainder the value of the machinery." And it was agreed, in open court, that if the court should render a decree for the interpleaders, Claes and Lehnbeuter, and should find and decree that the mortgage was fraudulent and void only as to the materials and stock in trade, then the amount to be awarded to them of said four thousand dollars paid into court should be the same proportion of four thousand dollars, as the sum of $2,129, the appraised value of the materials and stock in trade, bore to $5,404.25, the appraised value of all the property.

These being all the facts of the case the judgment of the court awarding the entire fund to the bank can not stand as a matter of law. Leisse's mortgage to the bank, as far at least as it covered his stock in trade and materials, was void as to his creditors under the statute which makes conveyances to the grantor's use void to that extent. Rev. Stat., sect. 2496; *Stanley v. Bunce*, 27 Mo. 269; *Lodge v. Samuels*, 50 Mo. 204; *Dobyns v. Meyer*, 20 Mo. App. 69, 70.

An exception has been recognized in this state in favor of a mortgagee, who takes actual possession of the mortgaged property before other creditors of the mortgageor have seized it (*Nash v. Norment*, 5 Mo. App. 545; *Greeley v. Reading*, 74 Mo. 309), but there is nothing in this case to bring the bank within the limits of the exception as stated in those cases.

It can not be justly contended that the bank ever took possession of this property or its proceeds, prior to the seizure of the proceeds on the execution of Claes *et al.* The mere fact of notifying the assignee that it

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claimed it under its mortgage, and the assignee's assent to hold the property, and manage it as theretofore is not even equivalent to symbolical delivery. The law requires actual and not constructive delivery of possession. Rev. Stat., sect. 2503; *Steele v. Benham*, 84 N. Y. 634; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Brunswick v. McClay*, 7 Neb. 137; *Pickard v. Marriage*, L. R. 1 Ex. Div. 364. It is true the assignee became the bailee of the bank, but he became such not by virtue of the notice, but by virtue of the fact that he acquired only the title of his assignor, which was that of a bailee of the bank. Actual notice of a fact, of which he had already constructive notice by the registry of the mortgage, did not change his status in any way. Neither were the proceeds of the property ever delivered by him to the bank. He deposited them in the bank as any other customer might have done, and withdrew them from the bank in order to deposit them in court when he filed his petition for an interpleader. There is not a tittle of evidence in the case that he ever parted with the control of the funds from the day of the sale until their deposit in court. Under these circumstances the claim that the facts bring this case within the exception established by *Greeley v. Reading*, is not tenable.

We are asked in an ingenious argument by counsel for the bank to extend the doctrine of *Greeley v. Reading* beyond the letter, and to declare the true spirit of that decision to be, that whenever a mortgage, fraudulent as to the creditors of the mortgageor by reason of a reserved power of sale in the mortgagee, loses the power to cause further injury to general creditors, the reason for considering it fraudulent has ceased, and creditors lose their right to complain. The learned counsel overlooks the fact that mortgages of this character are void as to the mortgageor's creditors by unequivocal provisions of the statute, which this court is not at liberty to fritter away by ingenious dissertations on

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the supposed policy of the law, and the respective equities of creditors.

We have followed *Greeley v. Reading* to the extent of points actually decided by that case, being bound to do so because it is the last controlling decision of the supreme court on those points. We have clearly intimated in *Dobyns v. Meyer* (20 Mo. App. 63), our regret that the court ever departed from the contrary rule laid down in *Armstrong v. Tuttle* (34 Mo. 432), and we are not inclined to extend a rule, which even, within its present limits, we are not prepared to vindicate on principle.

Finding that the mortgage was and is fraudulent and void as against the creditors of Leisse, as far as the materials and stock in trade are concerned, we order that the judgment be reversed and the cause be remanded to the trial court, with directions to make distribution of the fund in court as follows: To the interpleaders, Claes *et al.*, $1,575.85, and the residue to the International Bank, that being the proportion to which the parties are respectively entitled, according to their own stipulation, in the event of the determination of the case as now made. It is further ordered that the respondent pay the costs of this appeal and that the costs of the interpleader proceeding in the trial court be paid by the two interpleaders, share and share alike. All the judges concur.

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JOHN VOGEL, Appellant, v. MORITZ MEYER, Respondent.

St. Louis Court of Appeals, November 23, 1886.

1. CONTRACTS—CONSIDERATION BY WAIVER.—The waiver of a legal right on the part of a promisee is a sufficient consideration for a promise made on account of such waiver.

2. ——— CONSIDERATION RESTING ON CONVENIENCE.—Testimony from which it may legitimately be inferred that the promisor derived some benefit or convenience for his promise, furnishes evidence of a consideration to support the promise.

APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Reversed and remanded.

BROADHEAD & HAEUSSLER, for the appellant: Any act done at the defendant's request, and for his convenience, or to the inconvenience of the plaintiff, would be sufficient to support a promise by the defendant. *Given v. Corse*, 20 Mo. App. 132; 1 Parsons on Cont. [7 Ed.] 473; *Burr v. Wilcox*, 13 Allen, 273; *Stilwell v. Aaron*, 69 Mo. 545.

PRESLY N. JONES, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

This appeal involves the sum of thirteen dollars and sixty-five cents, and we regret exceedingly that owing to an erroneous instruction, which, under the facts of the case, was necessarily prejudicial to the plaintiff, the judgment of the trial court, which was for the defendant, can not be permitted to stand.

The controversy between the parties was as to whether the defendant agreed to repair a certain fence of the plaintiff's in consideration of its having been in-

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jured by the piling of the defendant's scrap iron against it, or whether he agreed to repair it in consideration of the plaintiff's not removing it until after the defendant had quit the occupation of the adjoining premises. There was testimony tending to support either version of the contract, and it was conceded that the plaintiff did not remove the fence during the defendant's occupancy of the adjoining premises, and that the defendant failed and refused to repair the fence when thereto requested after such occupancy ceased.

Numerous objections were made and exceptions saved by the plaintiff to the admission of testimony, and the giving and refusal of instructions. We have examined them carefully and find them all untenable, with this exception.

The court, of its own motion, instructed the jury:

"3. If the jury believe, from the evidence, that at the time of the alleged contract, the iron was not so piled against or upon the fence as to be disturbed by repairing the fence in question if the plaintiff had so undertaken, and if you further find that the fence in question had not been theretofore, and was not thereafter, injured by the defendant by piling iron against or upon it, then the plaintiff can not recover even though you believe the defendant did promise to repair the fence, or pay for its repair when he moved."

This instruction was clearly erroneous. If the defendant agreed to repair the fence in consideration of the plaintiff not removing it until he, the defendant, vacated the adjoining premises; and the plaintiff, thereupon, permitted the fence to remain *in statu quo* until defendant did vacate such premises, then the contract was based upon a consideration sufficient to support it, regardless of the fact whether the defendant had injured the fence or not, or of the fact whether the defendant's iron was piled against it or not.

That the fence was the plaintiff's fence is conceded. That he had a legal right to remove it at any time, ad-

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mits of no doubt. If he waived this legal right at the defendant's request, that of itself is a sufficient consideration to support the promise, although he may have suffered no inconvenience, and the other party may have derived no benefit from his so doing. 1 Parsons on Cont. 473; *Smith v. Weed*, 20 Wend. 184, 186; *Brooks v. Ball*, 18 Johns. 337; *Given v. Corse*, 20 Mo. App. 132. Moreover, there is sufficient in the testimony of the plaintiff to give rise to the legitimate inference that the non-removal of the fence was a convenience to the defendant, and being such furnished a sufficient consideration to support his promise. *Stilwell v. Aaron*, 69 Mo. 545; *Burr v. Wilcox*, 13 Allen, 573.

The judgment is reversed and the cause remanded. All the judges concur.

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HENRY LINK, Appellant, v. HENRY F. HARRINGTON, Respondent.

St. Louis Court of Appeals, November 23, 1886.

1. **FORCIBLE ENTRY—NON-LIABILITY OF SHERIFF.—An executive officer of the court is not liable in an action of forcible entry for acts committed by him while in the honest discharge of his legal duties.**

2. **——— BURDEN OF PROOF—ESSENTIAL EVIDENCE.—The plaintiff, in an action of forcible entry and detainer, must show that the defendant was in possession of the property at the date of the institution of the suit.**

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Affirmed.

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Broadhead & Haeussler, for the appellant: The sheriff, under his attachment against Alexe, had no right to enter the plaintiff's premises and take possession of the plaintiff's goods, or exclude the plaintiff from the possession of the premises in question. Smith on Sheriffs, 257; *Perry v. Carter*, 42 Vt. 50; *Davis v. Stone*, 120 Mass. 228; *Williams v. Powell*, 101 Mass. 467.

E. T. Farish and Lee Sale, for the respondent: The sole purpose of the "act concerning forcible entry and detainer is the protection of the citizen against forcible invasion of private property *by an individual acting altogether without authority of law.*" *Drehman v. Stifel*, 41 Mo. 205. Failure to show that the defendant was in possession at the time of suit brought is fatal to a recovery. *Armstrong v. Hendrick*, 67 Mo. 542; *Orrick v. St. Louis Public Schools*, 32 Mo. 315.

Rombauer, J., delivered the opinion of the court.

This is an action of forcible entry and detainer. The defendant is the sheriff of the city of St. Louis, and is sought to be held liable for entering the plaintiff's premises against the plaintiff's consent, in levying a writ of attachment on certain goods therein, belonging to a third party, and assuming exclusive control of the premises for a period of twenty hours or more, without the consent of the occupant, express or implied.

The action was instituted by the occupant of the premises, who upon the trial gave evidence tending to substantiate the facts as above set forth. The sheriff demurred to the evidence, and the court sustained the demurrer, and entered judgment for the defendant, hence this appeal.

We are informed by counsel for the appellant that this suit was designed to test the extent of the right of executive officers to take possession of premises, which are not in the actual occupancy of the attachment

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debtor; in levying a writ upon goods within such premises, and to hold such premises against the will of the occupant. If so the form of the action was very inaptly chosen.

The purpose of the act concerning forcible entry and detainer, is the protection of the citizen against the forcible invasion of private property, by persons acting without authority of law. This was intimated in *Drehman v. Stifel* (41 Mo. 205) and we are aware of no ruling to the contrary in, or out of this state. The sheriff is bound to levy a writ of attachment upon the goods of the debtor in the attachment wherever they may be found, and in doing so is not liable even in trespass to the person upon whose premises such goods may be. If he uses unnecessary force in entering premises, or, having entered them, continues to occupy them for a longer time than is reasonably necessary for the removal of the goods levied upon, and does so without the consent of the occupant, express or implied, he becomes liable in an action of trespass. *Davis v. Stone*, 120 Mass. 228. But while he acts in the honest performance of a legal duty he can never subject himself to the highly penal action of forcible entry.

The court might have properly non-suited the plaintiff on that ground alone, although the plaintiff's failure to prove that the sheriff still occupied the premises when this action was brought, was a defect of proof equally fatal to the plaintiff's recovery. *Armstrong v. Hendrick*, 67 Mo. 542.

All the judges concurring the judgment is affirmed.

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ALEX. YOUNG, Appellant, v. DUGALD CRAWFORD, Respondent.

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St. Louis Court of Appeals, November 23, 1886.

1. ATTORNEY AND CLIENT — IMPLIED CONTRACTS. — An attorney, as such, has no power to employ, at his client's expense, other attorneys to assist him in the prosecution or the defence of a suit.

2. ——— That the client is present at the trial and sees another attorney assisting in his suit, and fails to object thereto, does not, of itself, render the client responsible for such attorney's compensation.

3. INSTRUCTIONS — TECHNICAL WORDS. — The use of the words, "ratify" and "ratification," in an instruction, without explanation, does not render the instruction objectionable.

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

UPTON M. YOUNG and ALEX. YOUNG, for the appellant: With full knowledge of the services rendered, in the trial of his case, Crawford had no right to be silent. *Bank v. Gay*, 63 Mo. 33. In support of the plaintiff's instructions, we rely upon well established principles of agency, and upon the following authorities: *Holmes v. The Board of Trade of Kansas City*, 81 Mo. 137; *McCrary v. Ruddick*, 33 Ia. 521; *Scott v. Railroad*, 86 N. Y. 200; *Fister v. La Rue*, 15 Barb. 324.

WALKER & WALKER, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

This is an action to recover the reasonable value of legal services which plaintiff states were rendered by him

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to the defendant at his request. There was no evidence that the defendant had retained the plaintiff, but the evidence tended to show that one Kinealy, the defendant's attorney, had retained him to assist in the defence of a cause pending in the circuit court, and that plaintiff did render valuable legal services, in the defendant's presence and on his behalf in said cause.

When Kinealy first saw the plaintiff in connection with the case he simply stated that the defendant was very uneasy about it, and that he (Kinealy) wanted the plaintiff to assist in procuring testimony and to aid at the trial. The evidence tended to show that on the day of the trial Kinealy introduced the plaintiff to the defendant, with the statement, "This is Mr. Young, the attorney who is going to assist us in the trial of the case." Also, that Kinealy informed the defendant, prior to entering upon the trial of the case, that he had retained the plaintiff to assist, and that the defendant had answered, "all right," or, "that is good." These facts, however, were denied by the defendant, who, testifying on his own behalf, stated that he never authorized Kinealy to employ the plaintiff; that he never employed him himself, and never spoke to him; that he was present at the trial and heard the plaintiff argue a motion, made in his (the defendant's) behalf, but that the first intimation of the fact that the plaintiff looked to him for compensation, he received long afterwards when he settled with Kinealy for his legal services in the case.

This being substantially all the testimony, the plaintiff asked three instructions to the jury, all of which were refused by the court. The first made the defendant's liability dependent on the fact that he was informed by Kinealy that the plaintiff had been employed in the case. The second and third made the defendant's liability dependent on the fact that the services were rendered by the plaintiff in the defendant's presence, without objection on the part of the defendant.

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The jury found for the defendant. The plaintiff, appealing, assigns for error the refusal of these instructions.

These instructions were properly refused. The first was objectionable because it sought to make the defendant responsible, regardless of the time when he was informed by Kinealy of the plaintiff's employment in the defendant's behalf. The court gave this instruction in a modified form, and such modification was proper, in view of the fact that there was a conflict in the testimony as to when the defendant was first informed touching the nature of the plaintiff's employment.

The second and third instructions were objectionable because they predicated the defendant's liability on the fact that the services were rendered in his presence, and without any objection on his part, regardless of the fact whether the defendant knew, or had good reason to believe, that the plaintiff had been employed on his behalf and looked to him for compensation. The case of *Holmes v. The Board of Trade* (81 Mo. 144), relied on by the plaintiff in support of these instructions, shows the necessity of the qualification which they omit.

While the employment of an attorney is one that pre-supposes personal trust and confidence by the employer in the employe, there is nothing in the nature of the employment precluding one attorney from retaining another to aid him in the prosecution or defence of a suit under a promise, express or implied, that the attorney thus employed shall look to the attorney employing him for compensation. There is nothing in this record to negative the idea that the defendant had a right to suppose that this was done in the present instance.

The plaintiff relies mainly on the case of *McCrary v. Ruddick* (33 Ia. 521), in support of the soundness of the second and third instructions offered by him. An examination of that case will show that its facts were different, and while the language used by the learned judge who decided it, gives countenance to the propriety

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of these instructions asked by the plaintiff, yet such language was used in view of the particular facts developed by that case. In that case the attorney who made the employment occupied the dual relation of attorney and co-defendant, and the judge, in his opinion, lays stress upon the fact that the services were rendered at the request of one who was himself a defendant.

The plaintiff also assigns for error the giving of two instructions, one by the court of its own motion, and the other upon the defendant's request.

Of its own motion the court gave the following instruction:

"The court instructs the jury that, if they believe, from the evidence, that the plaintiff was employed by the witness, Kinealy, to assist in the defence in the trial of the case of Lancaster vs. Crawford, and that he informed said Crawford before, or during the trial, of said employment, for or on account of Crawford, then they will find for the plaintiff, what they believe, from the evidence, such services were reasonably worth."

And the following instruction upon the defendant's request:

"The jury are instructed that, by the employment of an attorney-at-law to conduct a case in court, a personal confidence and trust is imposed in said attorney which can not be by him delegated to another attorney, except by the consent of the client, or by the client's own ratification of such employment; and though said ratification shall not be in express terms, it must be of such a character that the jury can reasonably believe, from the client's actions, that he consented to the employment. If, therefore, the jury believe, from the evidence in this case, that the defendant never authorized his attorney, M. Kinealy, to employ the plaintiff, nor ratify any such employment, they will find for the defendant, and to enable the plaintiff to recover, he must prove by a preponderance of the evidence that such au-

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thority was given, or that such employment was ratified by the defendant."

There is nothing in either of these instructions of which the plaintiff can justly complain. The first is a mere modification of an instruction asked by the plaintiff, and the modification was, owing to the facts of the case, not only proper, but essentially requisite. The second states unquestioned propositions of law, not in the abstract, as the plaintiff complains, but in their application to hypothetical facts. The words, "ratify" and "ratification," are constantly used in instructions as ordinary words of the English language and in common use. They are not purely technical legal expressions, and no reason exists why their meaning should be defined and explained to an intelligent jury, any more than the meaning of the words, "sanction" or "approve."

The judgment is affirmed. All the judges concur.

ABE LAPP ET AL., Appellants, v. JOHN F. RYAN, EXECUTOR, ET AL., Respondents.

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St. Louis Court of Appeals, November 23, 1886.

1. CONTRACTS — RESCISSION — VENDOR AND VENDEE.—A vendor must exercise his right of rescission of a contract of sale for fraud on the vendee's part within a reasonable time, and he can not affirm in part and rescind in part.

2. ——— ESTOPPEL.—A vendor who has prosecuted to judgment an attachment against the vendee and his property on the ground of fraud by the vendee in making the purchase, can not assert against another attaching creditor of the vendee that the title to the property never passed to his vendee, and that the sale was rescinded prior to the adverse attachment.

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APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

M. N. SALE and LEE SALE, for the appellants: Alexe having made the purchase by means of fraudulent representations, and without intending to pay for the goods, plaintiffs might within a reasonable time after coming to a knowledge of their rights and of the facts affecting those rights, elect whether to affirm or to rescind the sale. *Cox v. Montgomery*, 36 Ill. 396; *Manahan v. Noyes*, 52 N. H. 232. An attaching creditor is not an innocent purchaser for value, but stands in the shoes of the fraudulent vendee, and can assert no other rights than could such vendee. *Goodger v. Finn*, 10 Mo. App. 226; *Bidault v. Wales*, 20 Mo. 546; *Buffington v. Gerrish*, 15 Mass. 156; *Bussing v. Rice*, 2 Cush. 48; *Acker v. Campbell*, 23 Wend. 372; *Devoe v. Brandt*, 53 N. Y. 462; *Field v. Stearns*, 42 Vt. 106. All facts necessary to constitute an estoppel by acts must be proved. *Hammerslough v. Cheatham*, 84 Mo. 13; *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235.

J. A. ROBERTSON and FRANK M. ESTES, for the respondents: To warrant a recovery, fraud and falsehood should be proved as material facts affecting a sale. *Terry v. Ins. Co.*, 3 Mo. App. 595; *Graham v. Thies*, 46 Ga. 479. If one elects between two inconsistent remedies and the rights of third parties have intervened, he is bound by his election. *Thompson v. Howard*, 31 Mich. 309; *Wetmon v. McDougall*, 32 Mich. 276; *Wild v. Burton*, 49 Mich. 53; *Joslin v. McCown*, 52 N. Y. 90; *Anchor Milling Co. v. Walsh*, 20 Mo. App. 107.

THOMPSON, J., delivered the opinion of the court.

This was an action of replevin for two barrels of

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whiskey. On a trial before the court sitting as a jury, a verdict and judgment were rendered for the defendant.

The real contest seems to be between the plaintiffs, who had sold the whiskey to one Frank Alexe, and Venable and Heyman, attaching creditors of Alexe. Certain undisputed facts, disclosed by the record, show that the plaintiffs were not entitled to recover, and render it unnecessary to state all the questions which have been raised.

The plaintiffs had sold the whiskey on credit to Alexe, and soon thereafter had attached it for their debt as the property of Alexe. Two days later Venable and Heyman caused an attachment against Alexe to be levied upon it. Before Venable and Heyman's levy was made, Alexe had undertaken in writing to release his title to the whiskey to the plaintiffs. They had accepted this release by their attorney, but continued to prosecute their attachment suit and to hold the whiskey under their levy therein. They were successful as against Alexe in an issue made by a plea in abatement therein, and they recovered a final judgment therein against him. It is true that they dismissed the second count of their petition in the attachment suit, which set up that Alexe was indebted to them in the sum of $203.93, the price of this whiskey. But this was not done until after the bringing of this replevin suit; nor did they ever release the levy of their attachment upon the two barrels of whiskey for which this replevin suit is prosecuted; as to the other items of indebtedness which they claimed, the levy of their attachment stood, and they recovered judgment.

Upon this state of facts it is apparent that the plaintiffs were not entitled to recover. It may be conceded, as we held in *Anchor Milling Co. v. Walsh* (20 Mo. App. 107), that if the plaintiffs had dismissed their attachment suit seasonably and before the rights of third parties had supervened, upon discovery that they had brought it improvidently, the mere fact of having brought it would

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not have estopped them from maintaining this action of replevin. But the rule must be otherwise where there has been an unreasonable delay in dismissing the attachment suit, and conclusively so where the rights of third parties have supervened.

This conclusion proceeds upon well understood principles. A sale of goods which has been procured through fraud is not void *ab initio*, but is voidable at the election of the vendor. *Oakes v. Turquand*, L. R. 2 H. L. 325; *Lead Mining Co. v. Baynes*, L. R. 2 Exch. 324; *Upton v. Englehart*, 3 Dill. 496; *Farrar v. Walker*, 3 Dill. 506 *n*; *Reese River Co. v. Smith*, L. R. 4 H. L. 64; affirming s. c., L. R. 2 Eq. 264; L. R. 2 Ch. 604; reversing s. c., 36 L. J. Ch. 385; *State v. Jefferson Turnpike Co.*, 3 Humph. 305; *Mixer's case*, 4 DeG. & J. 575. The contract subsists in full vigor until it is thus avoided. *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 64, 73; *Upton v. Englehart*, 3 Dill. 496. And the party thus defrauded must, as in every other case of contracts procured through fraud, if, he would rescind, make his election within the shortest limit of time which is fairly practicable. *Oakes v. Turquand*, L. R. 2 H. L. 325; *Kent v. Freehold Land Co.*, L. R. 3 Ch. 493; reversing s. c., L. R. 4 Eq. 588; *Stone v. City and County Bank*, 3 C. P. Div. 282. He will not be allowed to affirm and disaffirm at the same time, in the most deliberate manner and with full knowledge of his rights. He can not in this case, at one and the same time sue for the purchase money, attaching the goods as the property of the vendee, for a debt due to him from the vendee which includes the purchase money of the identical goods, and maintain an action of replevin for the goods. In this case the very least that can be said is, that the plaintiffs were bound to stand or fall upon the state of facts existing at the time when this replevin suit was brought. And when this suit was brought, they were prosecuting a suit against their vendee, through whom the defendant in this action claims, for the purchase money of these

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very goods, and they were holding the levy of an attachment upon them in the same suit. By these acts they had estopped themselves from rescinding the sale and claiming these goods as their own.

The judgment must be affirmed. It is so ordered, with the concurrence of all the judges.

W. SCHLUTER ET AL., Respondents, v. A. WIEDENBROCKER ET AL.; CHRIST. DORN, Appellant.

St. Louis Court of Appeals, November 23, 1886.

1. MECHANIC'S LIENS—JUSTICES—INARTIFICIAL STATEMENT.—A statement, in a suit before a justice to enforce a mechanic's lien, will support a lien judgment, if it contain the necessary jurisdictional averments, although it be inartificially drawn.

2. PRACTICE—CONCLUSIVENESS OF FINDINGS.—The findings of fact are conclusive, where no instructions are asked or given, and where there is substantial evidence to support such findings.

3. ——— EVIDENCE—INCOMPETENT TESTIMONY.—The admission of incompetent testimony to prove a fact, is not ground for a reversal of the judgment, where the evidence of the complaining party fully established such fact.

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

HENRY BOEMLER, for the appellant.

JOHN F. WIELANDY, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This action was brought before a justice of the peace to enforce the lien of a sub-contractor upon the

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leasehold interest of the defendant and appellant, Dorn, in certain described premises, and to recover a general judgment against the defendant, Wiedenbrocker, as principal contractor. The case was appealed to the circuit court, where, upon a trial before the court sitting as a jury, a general judgment was rendered against the contractor, and a special judgment against the leasehold interest of the owner, in conformity with the prayer of the petition. Dorn, the owner, has alone appealed.

I. The first objection of the appellant that the petition, upon which the action was commenced before the justice, does not state the necessary jurisdictional facts, within the rule laid down by this court in *Ewing v. Donnelly* (20 Mo. App. 6), is clearly not tenable. The petition sets forth with fullness of statement, though with some grammatical inaccuracy, all the facts required by the statute, to-wit: The doing of the work upon the premises (describing them) under a contract between the plaintiff and the defendant, Wiedenbrocker; the ownership of the premises by the defendant, Dorn; a contract, embracing the work, between Dorn and Wiedenbrocker; the filing by the plaintiffs in the office of the clerk of the circuit court, within four months of the doing of the work, of a just and true account thereof; an exhibition of this account in the body of their petition; and the allegation of a notification by them, ten days prior to the filing of such account, of their intention to bring an action to enforce their mechanic's lien against the premises, before the justice before whom this suit was brought. The filing of this petition and the service of the summons gave the justice jurisdiction to proceed to render *some* kind of a judgment; and any final judgment which he may have rendered, though void because of the plaintiff's failure to prove, as he had alleged, the necessary jurisdictional facts, and hence subject to collateral attack if not appealed from, under the rule in *Ewing v. Donnelly* (*supra*), would be sufficient to support an appeal to the circuit court.

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II. In the circuit court, the case, as thus laid in the petition, was fully proved, except as to the date as to when the last item of work was done. There was a conflict of evidence as to whether it was done within four months of the filing of the account and claim of lien in the office of the clerk of the circuit court, and therefore it is sufficient to say that the finding of the circuit judge sitting as a jury, is conclusive on this point. The claim of lien, embracing the just and true account required by the statute, was put in evidence, and so was the written notice given by the plaintiffs to the defendant, Dorn, of their purpose to bring an action before this particular justice to enforce their mechanic's lien, as required by section 3190, Revised Statutes. Both of these instruments were in compliance with the statute. No declarations of law were asked by either party, and none were given by the court.

III. Complaint is made that the circuit court, against the objection of the defendant, Dorn, allowed the plaintiffs, when testifying as witnesses, to state that Wiedenbrocker, the principal contractor, told them that he was contractor for Dorn and that the houses were Dorn's houses. These unsworn declarations of Wiedenbrocker were incompetent as against Dorn, to prove the facts necessary to charge Dorn. They were hearsay evidence, and ought to have been excluded so far as Dorn was concerned. But the error was rendered harmless to Dorn, by the fact that Wiedenbrocker was afterward put upon the stand as his witness and testified to the same facts, and by the further fact that Dorn subsequently took the stand as his own witness and did not deny such facts, but testified to his acceptance of the houses from the contractor, Wiedenbrocker, on a date named, a circumstance which was consistent only with the existence of such facts. The error was, therefore, not prejudicial to the defendant, Dorn, and furnishes no ground for reversing the judgment.

The judgment will be affirmed. It is so ordered. All the judges concur.

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W. HEWITT ET AL., Appellants, v. J. E. TRUITT ET AL., Respondents. 23a 443 31a 86

St. Louis Court of Appeals, November 23, 1886.

1. MECHANIC'S LIENS—SUB-CONTRACTORS—NOTICE.—It is essential to a sub-contractor's recovery against the contractor and the owner, that he should show service, upon the owner, of notice of his intention to file a lien within the time required by statute, and the owner's absence from the state will not excuse a failure to do so.

2. ——— PLEADINGS—ALTERNATIVE PLEAS.—In pleading statements in the alternative each of the alternatives must state a legal cause of action or defence, and if either of the statements is insufficient in law the entire plea is defective.

APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Affirmed.

W. M. KINSEY, for the appellants.

W. F. SMITH and D. D. FASSETT, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This was an action brought before a justice of the peace by a sub-contractor to enforce a mechanic's lien. Judgment was rendered by the justice against the principal contractor for the amount of the plaintiff's demand, and against the property establishing the lien. The defendant, Klockzin, the present owner of the property, alone appealed to the circuit court. The circuit court refused to allow any evidence to be introduced under the petition, and, thereupon, the plaintiffs tendered an amended petition and requested leave to file the same, which leave the court refused, and they

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declining to plead further, judgment was rendered for the defendant.

According to the original petition, Nannie J. Brown was the owner of the real estate at the time when the principal contract for the building was made, and it was made between her and Truitt, as principal contractor. The defendant, Klockzin, was described as the *present* owner of the premises by a mesne conveyance from Nannie J. Brown. Another defendant, Simpson, who did not appeal from the justice, was described as having some interest therein. The vice of the original petition was, that instead of averring notice of the plaintiffs' claim of lien on Mrs. Brown, it averred that such notice was given to Klockzin and Simpson.

The amendment which the plaintiffs tendered in the circuit court alleges that the premises against which the lien is sought to be enforced, were conveyed to Nannie J. Brown, through whom the defendant, Klockzin, claims by a deed dated March 20, 1884. It then proceeds as follows: "Said Nannie J. Brown either became the absolute owner of said lot, or thereby acquired and held the same in trust for the use of the defendant, Joseph E. Truitt, who thereby became and was the real owner thereof, said plaintiffs do not know which, but aver their belief in the one or the other alternative. Plaintiffs further state that on or about the —— day of April, 1884, said Nannie J. Brown either entered into a contract with said defendant, Truitt, to erect on said described lot a four room story and one-half brick dwelling house, or as the real and beneficial owner of said lot, said Truitt, at or about that time, begun the erection of said dwelling on said lot on his own account, said plaintiffs do not know which, but aver their belief in the one or the other alternative; that afterwards said defendant, Truitt, either as the original contractor with Nannie J. Brown, or as the beneficial owner of said lot, plaintiffs do not know which, but aver their belief in the one or the other alternative, entered into a

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contract with the plaintiffs to furnish the necessary materials therefor, and do the painting on said dwelling house, to be erected as aforesaid, upon said lot, and that, in accordance with the terms and conditions of their contract with said Truitt, plaintiffs have furnished materials and performed labor of the value of sixty-five dollars, in and about, and upon said described lot, owned as aforesaid, the particulars of which will more fully appear in the bill of items referred to above; that plaintiffs demanded of defendants payment thereof, which was by said defendants refused, and that said sum is now unpaid and due plaintiffs; that said account accrued and became due on the twentieth day of September, 1884, and that on the seventh and ninth days of January, 1885, plaintiffs served a notice in writing on the defendants, Klockzin and Simpson, of their claim against said lot, and improvements thereon, stating the amount thereof, and from whom due, and of their intention to file a lien therefor if not paid within ten days. Plaintiffs further state that on the nineteenth day of January, 1885, they filed in the office of the clerk of the circuit court of the city of St. Louis, Missouri, a just and true account of said indebtedness, and a true description of said lot, with the name of the owner thereof, verified by affidavit, and their claim for a lien upon said lot for the amount of said indebtedness, according to law, with the notice stating the date when, and the justice of the peace before whom this action is instituted for the enforcement of such lien. Plaintiffs still further state that on or about the ——— day of December, 1884, the said Nannie J. Brown absconded from and left the state of Missouri; that she remained out of said state until after the time for filing the aforesaid lien had expired; that her whereabouts was unknown to plaintiffs; that she had no agent; and that after the work on said dwelling house had been commenced, and before the completion thereof, the defendant, Klockzin, acquired title to said described lot by deed

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from said Nannie J. Brown." The rest of the petition describes the interest of the defendant, Simpson, and prays for judgment in the usual way.

It is plain that the circuit court committed no error in refusing to allow this amendment to be filed. It failed to state the jurisdictional facts necessary to entitle the plaintiffs to a mechanic's lien upon the premises described. In the first place, it pleaded the ownership of the land when the contract was made, in the alternative, as being either in Mrs. Brown or in Truitt, and it pleaded the *status* of Truitt, in the alternative, as being either that of a principal contractor under Mrs. Brown, the owner, or as being himself the beneficial owner, and doing the work for himself on his own land. Now, while our code permits a pleader to state facts in the alternative, yet this can only be done where both alternative statements are good as matter of law. Now, suppose that under this form of statement, it should turn out that when the work was done, Mrs. Brown was the owner of the premises, and that the work was done by Truitt under a contract with her, then the plaintiffs would land just where their original petition landed them ; because their amended petition fails to show that they gave notice, either to Mrs. Brown or to her agent, of the filing of their lien, as required by section 3190 Revised Statutes, which is a jurisdictional fact essential to the existence of their lien. Nor is their petition helped by the averment that Mrs. Brown had absconded and remained out of the state until the time for the filing of their claim of lien had expired ; that her whereabouts were unknown to the plaintiffs, and that she left no agent upon whom such notice could be served. A mechanic's lien is purely a creature of statute. It can only exist where the steps pointed out by the statute have been taken ; and if the owner of land upon which a building is erected can, by going out of the jurisdiction, and leaving no agent behind him, upon whom notice of the

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lien can be served, defeat the operation of the statute, it is a result for which the courts are not to blame. It is simply a case of defective legislation, and the courts have no power to amend the statute. It is worthy of consideration whether the legislature ought not so to amend section 3190, Revised Statutes, as to provide for constructive notice by publication in cases where the owner is a non-resident and leaves no agent within the jurisdiction upon whom notice of the lien can be served.

As the defendants, Klockzin and Simpson, were not the owners, between whom and Truitt the principal contract was made, it is needless to say that notice to them of the claim of lien did not satisfy the statute, although they may have acquired the premises by mesne conveyances from Mrs. Brown prior to the completion of the work. They were indeed, proper parties defendant, under section 3190, Revised Statutes, and if the proper steps had been taken as against Mrs. Brown to establish a lien, it would have been good as against them; they would have taken the land from Mrs. Brown subject to the incumbrance of the lien, inchoate or otherwise, as the title stood in her.

We have had the advantage of seeing a memorandum of an opinion given in the case by Judge Thayer, who sat in the circuit court. His views are substantially the same as ours, and we might have decided the case by adopting his opinion.

The judgment will be affirmed. It is so ordered. All the judges concur.

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J. G. DOYLE, Appellant, v. J. E. TRUITT ET AL., Respondents.

St. Louis Court of Appeals, November 23, 1886.

1. MECHANIC'S LIENS—SUB-CONTRACTORS—NOTICE.—It is essential to a sub-contractor's recovery against the contractor and the owner, that he should show service, upon the owner, of notice of his intention to file a lien, within the time required by statute, and the owner's absence from the state will not excuse a failure to do so.

2. ——— PLEADINGS—ALTERNATIVE PLEAS.—In pleading statements in the alternative each of the alternatives must state a legal cause of action or defence, and if either of the statements is insufficient in law the entire plea is defective.

APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Affirmed.

W. M. KINSEY, for the appellants.

W. F. SMITH and D. D. FASSETT, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This case is the same in its essential features as the case of *Hewitt v. Truitt* (*ante*, p. 443); and, for the reasons set forth in the opinion delivered in that case, the judgment of the circuit court in this case will be affirmed. It is so ordered. All the judges concur.

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JOHN B. ETZ, Respondent, v. R. T. WHEELER, Appellant. 23 449 / 35 447

St. Louis Court of Appeals, November 23, 1886.

1. FOREIGN JUDGMENT—PLEADING AND EVIDENCE.—The provisions of the federal statutes on that subject do not exclude the common law method of proving foreign judgments.

2. PLEADING—JURISDICTION, HOW PLEADED.—It is sufficient under the statute, in pleading the judgment of a court of special jurisdiction, to state that jurisdiction has been duly conferred, without stating the facts.

APPEAL from the St. Louis Circuit Court, AMOS. M. THAYER, Judge.

Affirmed.

DYER, LEE & ELLIS, for the appellant: Foreign statutes must be pleaded in actions where a recovery is based upon them. *Banchor v. Gregory*, 9 Mo. App. 102; Bliss on Code Pleading, 183; *Sheldon v. Hopkins*, 7 Wendell, 435; 1 Greenleaf on Evidence, par. 488; Wharton on Evidence, par. 300 to 311.

JOHN D. POPE and JOHN A. LEWIS, for the respondent: When the judgment is rendered in a sister state, the cause of action is merged, and a suit here must be brought on the judgment. Freeman on Judg., sect. 221; *Henderson v. Staniford*, 105 Mass. 504; Bigelow on Estoppel, 251; *Eldred v. Bank*, 17 Wall. 545. The copy of the docket of a justice can not be certified under the act of congress, though the judgment itself is conclusive. 1 Wharton on Evidence, sect. 99; 2 *Id.*, sect. 808; 1 Greenleaf on Evidence, sect. 505; *Pelton v. Planter*, *supra; Silver Lake Bank v. A. H. Harding*, *supra*.

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THOMPSON, J., delivered the opinion of the court.

This was an action upon a judgment of a justice of the peace of the state of Ohio. The plaintiff had a verdict and judgment. Two points are made by the defendant.

1. The first is that the justice's judgment was not authenticated according to the act of congress, but was proved by the depositions of witnesses according to the common law. No authority is cited in support of the position that the act of congress excludes the common law mode of proving a foreign judgment, and we see no reason for so holding.

2. The other point is that the statute of Ohio conferring jurisdiction upon the justice was not pleaded, and decisions are cited from other jurisdictions to show that in an action upon the judgment of a court of limited or special jurisdiction it is not only necessary to aver that the court had jurisdiction to render the judgment sued on, but also to set forth the statute conferring the jurisdiction. This rule of pleading never had any sense in it, since the essential fact which the plaintiff takes upon himself the burden of proving is that the tribunal had jurisdiction. This, in the case of a tribunal of special and limited powers such as a justice of the peace, he must aver and prove, because he is not aided by any presumption of jurisdiction, such as obtains in the case of a court of general jurisdiction, which presumption would operate to shift the burden to the defendant of showing a want of jurisdiction. But while the plaintiff has always been rightfully required to aver and prove jurisdiction in the case where he claims the right under the judgment of a court of limited or special jurisdiction, there never was any sense in requiring him to plead the statute conferring the jurisdiction, since such a statute is merely evidence of the jurisdiction, and the pleading of it would be merely the pleading of evidential matter. Our code of procedure has repealed the old rule and

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settled the law in accordance with common sense by providing (sect. 3551, Rev. Stat.) that, "in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring the jurisdiction, but such judgment or determination may be stated to have been duly given or made." See also *Wickersham v. Johnson*, 51 Mo. 313.

The judgment of the circuit court will be affirmed. It is so ordered. All the judges concur.

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GLOBE PRINTING COMPANY, Respondent, v. FRED. STAHL, Appellant.

St. Louis Court of Appeals, November 23, 1886.

1. EVIDENCE—JUDICIAL NOTICE—TELEPHONES.—Courts will take judicial notice that telephones have become an ordinary medium of communication and interchange of thought.

2. ——— Evidence of an answer purporting to come from the defendant, received over wire connecting the defendant's telephone with that of the plaintiff, in response to an inquiry made through the same medium by the plaintiff, is admissible without positive proof that the defendant sent the answer.

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Affirmed.

GEORGE A. CASTLEMAN, for the appellant.

O. B. GIVENS, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This is an action to collect a debt alleged to be due upon contract. The case was tried before a jury; the

plaintiff had a verdict and judgment, and the defendant has appealed.

The sole question which arises upon the record is, whether the court erred in admitting evidence of a conversation had through a telephone between the plaintiff's book-keeper and a person who answered to the defendant's name. The book-keeper testified that he "called up by telephone to the general office of the Bell Telephone Company for defendant's number, and was, by the central office, connected therewith; that the list of the telephone company showed that the defendant had two telephones, one at his undertaking establishment on Franklin avenue, in the city of St. Louis, and another at his livery stable, on Olive street; that witness was not certain which number he called, but that his best recollection was that it was the Olive street number; that there was an answer from the defendant's number to the telephone call; that he (the witness) did not know whose voice it was, and does not now know; that the witness did not know the defendant's voice, and did not know the defendant, but that he asked, through the telephone, if that was Stahl (the defendant), and the answer was "Yes." The witness was then asked to give the conversation then had through the telephone with the party answering the call. In response to this question the witness testified, against the objection of the defendant, "that he asked why defendant did not pay the bill for which this suit was brought, and that the party answering said, 'All right; I will attend to the matter about the first of the month.'" A previous witness had testified for the plaintiff to a conversation through the telephone in a similar manner with the defendant, whose voice the former witness identified.

We are of the opinion that the court correctly ruled that the testimony was admissible. We should have no difficulty in so holding upon principle, but we find on examination of the books several decisions upon anal-

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ogous rules touching the admissibility of evidence. It is said by a recent writer of reputation: "Evidence that a person making a tender, found at the place of business of the other party a person answering to the name, who said he was the man and admitted the contract to be his, but refused to pay the money, is competent to go to the jury upon the question of identity, and sufficient to uphold a verdict." Abbott's Trial Evidence, 316. It has been held in Massachusetts that a letter received through the postoffice, purporting to be written in reply to a letter sent to the person by whom it purports to be signed, is admissible without proof of the handwriting, though the question was not deemed important and was not much considered. *The State v. Bradish*, 14 Mass. 296, 297, 300. In Pennsylvania the plaintiff's attorney was permitted to testify that a person unknown to the witness had introduced himself to the witness, representing himself as the defendant, and promising to pay the debt sued on, and this, without other evidence of the identity of the person who so introduced himself and promised. In a case in the superior court of New York City, evidence that, on two or three occasions when the witness first called at the place of business of the defendant's testator, witness was told that the testator was out of town and that there was no one to represent him, and that subsequently the witness found there a person answering to the name of the defendant's testator, who said that he was the man and admitted the contract sued on to be his, but refused to pay the money due thereon, was held competent to go to the jury on the question of his identity and sufficient to uphold a verdict for the plaintiff, in the absence of any evidence tending to raise a suspicion of mistake or collusion. *Howard v. Holbrook*, 9 Bosw. 237, 243.

Several analogous English cases are also found.

Thus, where a witness, called to prove the defendant's handwriting, had corresponded with a person bearing his name, who dated his letters from Plymouth

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Dock, where the defendant resided, and where, it appeared, that no other person of the same name lived, this evidence of the defendant's identity was held sufficient. *Harrington v. Fry*, Ryl. & M. 90.

In like manner it was held by Lord Kenyon at *nisi prius* that if a letter be sent to a particular person, and an answer be received in due course, the fair presumption is that the answer was written by the person addressed in the letter, and accordingly he ruled that a witness who had so written such a letter and received such an answer, might be examined as to the genuineness of another paper, for the purpose of showing whether it was or was not written by the person with whom he had this correspondence. *Carey v. Pitt*, Peake Add. Cas. 130.

In an action for damages for a negligent injury in navigation, it was objected that the evidence did not show that the defendant was the pilot in charge of the vessel, whereupon the plaintiff called out in open court, "Mr. Henderson!" (the name of the defendant), and a man in court answered, "Here; I am the pilot." A witness then testified that the man who had so answered was at the time acting as pilot. It was held, reversing an order directing a non-suit, that this was sufficient evidence of identity to go to the jury. *Smith v. Henderson*, 9 Mees. & W. 798, 801.

In another case a witness had stated that he had introduced a person of the name of the defendant to the plaintiff as a customer, and that he saw him write a letter, which was produced, and which established the plaintiff's claim; but the witness had not seen the person since, and did not know that he was the defendant. It was held that this evidence was admissible, and was sufficient to support a verdict for the plaintiff. *Sewell v. Evans*, 4 Q. B. 626.

In an action against an alleged acceptor of a bill of exchange, the only evidence of his acceptance was the testimony of a bank clerk to the effect that two years

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before he saw a person of the defendant's name sign his name in a book; that he had never seen him since, but that he thought that the handwriting was the same, and had since seen checks bearing the same signature. It was held that this evidence was admissible. *Harrington v. Fry*, 8 Scott. 384.

In a similar action against the alleged acceptor of a bill of exchange, it appeared that the bill had been sent by mail for acceptance, directed to "Charles Banner Crawford, East India House," and that it had been returned accepted, "C. B. Crawford." A witness testified that the signature to this acceptance was the signature of Charles Banner Crawford, who was formerly a clerk in the East India House, but the witness did not know whether that Mr. Crawford was the defendant. It was held that this was sufficient evidence of identity, at least in the absence of an affidavit to show that the defendant was not the same person. *Greenshields v. Crawford*, 9 Mees. & W. 314.

Any person examining the directory of the city of St. Louis will see that there are in this city many persons who possess the same christian and surname, but such circumstances have not operated to do away with the familiar rule, acted upon in this state, and so far as we know in all other jurisdictions, that identity of name is *prima facie* evidence of identity of person. *Flournoy v. Warden*, 17 Mo. 435; *Gitt v. Watson*, 18 Mo. 274; *The State v. Moore*, 61 Mo. 279.

It was held in Massachusetts in a criminal trial that for the purpose of proving that the defendant had made certain communications to persons in New York, evidence was admissible that certain telegraphic messages in his writing had been delivered to the operators of the telegraph company, other evidence being given to the effect that such messages were by the operators transmitted over the wires to the persons to whom they were addressed by the defendant. This decision was approved and applied by an eminent judge in a celebrated criminal

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trial. *The United States v. Babcock*, 3 Dill. C. C. 571, 575, per Dillon, J. It is but an extension of the familiar rule applicable to carriage by the post, under which evidence that a letter was deposited in the postoffice, properly directed, is admissible as tending to show that it was received by the person to whom it was addressed, provided such person were living at the place to which it was directed, and usually received his letters there. 1 Greenl. Ev., sect. 40; *Dana v. Kemble*, 19 Pick. 112; *Briggs v. Hervey*, 130 Mass. 187; *Huntley v. Whittier*, 105 Mass. 391; *Bank v. McMonigle*, 60 Pa. St. 156; *Bussard v. Levering*, 6 Wheat. 102; *Lindenberger v. Beall*, 6 Wheat. 104.

Upon a somewhat analogous principle it has often been held that in case of the death or absence from the country of a subscribing witness, it is competent to prove the genuineness of his signature, and that such proof will raise a presumption of the genuineness of the signature which the subscribing witness attested. *Adams v. Kerr*, 1 Bos. & Pul. 331; *Nelson v. Wittal*, 1 Barn. & Ald. 19; *Sluby v. Chaplin*, 4 Johns. 461. And although this rule has not been universally accepted (*Robards v. Wolf*, 1 Dana, [Ky.] 155), it seems to be the law in this state. *Little v. Chauvin*, 1 Mo. 626.

But laying out of view these analogies, a decision of our supreme court is found so closely analogous to the case at bar that it may be treated as an authority which we should not be at liberty to disregard. The action was under the statute of this state, known as the "Boat and Vessel act," for the non-performance of a contract alleged to have been made by the master of the defendant steamboat with the plaintiff by telegraph. Evidence was given tending to show that the plaintiff sent a dispatch to the defendant steamboat, which was delivered to her officers. The plaintiff then offered evidence tending to show that a dispatch purporting to come from the master of the steamboat in reply to his dispatch addressed to him, had been delivered for transmission in the

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telegraph office at the place where the boat was, and had been received by him, but without offering to prove that such dispatch had been in fact sent by the master of the defendant steamboat, or with his consent. It was held that this evidence was admissible. In giving the opinion of the court, Scott, J., said: "It is not expected, when men contract by telegraph, that they are afterwards to be bound or not, as their passions or interest may dictate. Such contracts may be regarded as binding and obligatory, as if made in the ordinary way. Private communications relative to business, made by means of a telegraph, are usually relied on, and that reliance has not proved unfounded. When men consent to use the telegraph for the purpose of making an agreement, there is no hardship in submitting to a jury, as evidence of their consent to such an agreement, those facts and circumstances which are received by and acted upon by mankind in communication through that medium. Here, the defence does not turn on any imposition or forgery on the part of the agents of the telegraph; but the plaintiff, by the pleadings, is put to the proof of the contract on which he has sued. The evidence is ample to show that a communication was made by the plaintiff to the defendant, but the difficulty arises in showing that the answer to that communication was from the agent of the defendant. The telegraphic agent testified that the dispatch received from the plaintiff was delivered to the officers of the steamboat Robert Campbell, and a dispatch in answer to that of the plaintiff was deposited in his office to be forwarded to the plaintiff, which was done on the next day. If, under such circumstances, any person had received a dispatch in answer to one forwarded by him, he would not have failed to act upon it. His conduct would have been based upon the faith usually given to the correctness and fidelity with which such business is transacted by the agents of the telegraph. For these reasons, we are inclined to the opinion that the evidence offered by the

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plaintiff was sufficient to permit the dispatch to be read to the jury, who would then, from all the circumstances, determine whether it was the act of the master of the boat." *Taylor v. Steamboat*, 20 Mo. 254, 260.

The only decision to which we have been referred where the instrument of communication was a telephone, is that of the court of appeals of Kentucky, in the case of *Sullivan v. Kuykendall* (24 Am. Law Reg.) In that case, A., desiring to communicate with B., applied to the telephone operator to call B. The operator thereupon held what purported to be a conversation with B., repeating the supposed communication of B. to A. as it came over the wire. It was held, in an action between A. and B., that A. might prove, by himself and others, what the operator had reported to him as coming from B., the operator himself having been called as a witness and not remembering the conversation.

All these decisions proceed upon the principle that those evidentiary matters upon which men are compelled to act in the ordinary affairs of life and in the usual transactions of business ought to be allowed to go to the jury in cases where they become material to the issues on trial. The telephone, although a very recent invention, has come into such common use that, we think, as the learned judge of the circuit court is reported to have reasoned, that, the courts may properly take judicial notice of the general manner and extent to which it is made use of by the business community. No doubt very many important business transactions are every day made by telephonic communications of precisely the same character as that which the witness was allowed to testify in this case. A person is called up by one desiring to communicate with him by means of a connection of their respective wires through what is known as the central office. A conversation ensues. It may be relative to the most important matters of business. It may involve a contract for the sale of bonds and stocks, instructions from a principal to his agent touching important

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transactions, or the acknowledgment of a debt due and a promise to pay the same. The use of this instrument facilitates business to such an extent that it would be very prejudicial to the interests of the business community, if the courts were to hold that business men are not entitled to act upon the faith of being able to give in evidence to juries replies which they receive to communications made by them to persons at their usual places of business in this way.

The judgment of the circuit court will be affirmed. It is so ordered. All the judges concur.

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STATE OF MISSOURI, Respondent, v. S. D. WHITTEN, Appellant.

Kansas City Court of Appeals, December 6, 1886.

CASE ADJUDGED.—Where a motion was filed in the trial court, after judgment rendered, upon a forfeited recognizance, on return of writ of *scire facias*, and real estate of defendant sold under execution issued thereon: and motion was overruled and appeal taken upon such ruling, and no assignment of errors, or any abstract of the record, or any briefs are filed in this court, the judgment will be affirmed.

APPEAL from Henry Circuit Court, HON. JAMES B. GANTT, Judge.

Affirmed.

The case is stated in the opinion.

PHILIPS, P. J.—This is a proceeding on a forfeited recognizance. Judgment was rendered on return of writ of *scire facias*, and under execution issued thereon the real estate of appellant was sold. He filed motion to

set aside the execution and vacate the sale on the return day of the writ of *fi fa.* From the judgment of the court in overruling said motion he has appealed. He has failed to file in this court any assignment of errors, or any abstract of the record, or any briefs.

The judgment of the circuit court is, therefore, affirmed. All concur.

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STATE OF MISSOURI, Respondent, v. EUGENE J. HALLER, Appellant.

Kansas City Court of Appeals, December 6, 1886.

PROCEEDINGS BEFORE JUSTICES FOR MISDEMEANORS—CONSTRUCTION OF SECTION 2058, REVISED STATUTES.—By section 2058, Revised Statutes, an appeal is provided for where any person is *convicted* before a justice of the peace for any misdemeanor, under the provisions of article *twenty-third* of the Revised Statutes. But no appeal lies where the defendant *pleads guilty.* Nor is the discretion of the justice in assessing the punishment against defendant, reviewable on appeal.

APPEAL from Cooper Circuit Court, HON. E. L. EDWARDS, Judge.

Affirmed.

Statement of case by the court.

This action was begun before a justice of the peace upon an information charging the defendant with the commission of a certain misdemeanor. The defendant, having been arraigned in the justice's court, "pleaded guilty in manner and form as charged in said complaint." It appears from the abstract of the record, filed by the defendant, that, thereupon, "the justice, after hearing the evidence, assessed his punishment at a

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fine of one hundred and fifty dollars, and entered up judgment accordingly."

From said judgment defendant appealed to the circuit court. The circuit court sustained a motion to dismiss the appeal, for the reason that "the defendant entered a plea of guilty before the justice, and was not convicted."

From said judgment dismissing his appeal defendant has appealed to this court.

T. M. RICE, for the appellant.

I. The prosecution was for a misdemeanor, commenced by information, under section 2025, Revised Statutes. Under sections 2043, 2044, 2050, and 2058, Revised Statutes, two issues are submitted to the justice. *First*, the guilt of the defendant; *second*, the extent of the punishment. The first may be waived by a plea of guilty. But the extent of the punishment can only be determined by hearing of evidence "touching the nature of the case and the facts thereof." And upon such hearing the defendant "shall have an opportunity to be heard."

II. A defendant entering a plea that he committed the offence charged, is not thereby estopped from complaining that he has been aggrieved by the judgment of the justice in fixing his punishment. Any other conclusion is in plain violation of the manifest terms of the statute, and an arbitrary denial of the defendant's rights, "due process of law."

No brief for the respondent.

HALL, J.—The question is, did an appeal lie in favor of the defendant from the judgment of the justice of the peace assessing the punishment?

The contention, by the counsel of defendant, in favor of an affirmative answer to this question, is based upon sections 2043, 2044, 2050, and 2058, Revised Stat-

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utes. The argument made by the said counsel in support of their contention is, that by the information, two issues were submitted to the justice of the peace: (1) the guilt of defendant; (2) the extent of the punishment to be assessed against the defendant; that the guilt of the defendant was established by his plea of guilty, but that the extent of the punishment to be assessed against him was not affected thereby; and that, although the defendant was estopped from denying his guilt by his plea of guilty, he was not deprived of the right to appeal from the judgment assessing his punishment.

It is true that it is provided by section 2044 that upon a plea of guilty by a defendant "the justice shall assess the punishment and enter up the proper judgment, and in order thereto he *may* hear evidence touching the nature of the case, *or otherwise ascertain the facts thereof*; but in no case shall he accept the plea of the defendant and assess his punishment without giving the injured party notice, and an opportunity to be heard;" but we do not think the provisions of said section support the position of the defendant's counsel. Neither do we think that said position is supported by the other sections of the statute cited.

We shall but briefly state our reasons for holding as we do. The justice does not have to hear evidence from any one but the *injured party*. Where there is no injured party the justice *may* hear evidence in order to ascertain the facts of the case, or he may ascertain the facts otherwise, without hearing evidence at all. The extent of the punishment cannot be an issue, because it may be determined without hearing evidence.

The extent of the punishment is not an issue for another reason. The justice must assess the punishment. Were it an issue, the defendant ought to be entitled to a jury.

It is conceded that the plea of guilty is final and conclusive upon the guilt of defendant, unless set aside

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or withdrawn, and that no appeal lies from it. The judgmemt rendered where there is a plea of guilty is an entirety. The judgment is not divisible. The portion of the judgment assessing the punishment is not separable from the remainder of the judgment. An appeal, if it lies, lies from the judgment as a whole.

By section 2058, an appeal is provided for where any person is *convicted* before a justice of the peace for any misdemeanor under the provisions of article 23, Revised Statutes. A person who pleads guilty cannot be said to be convicted. No appeal lies in a case where the defendant pleads guilty. That this is true is further shown by section 2063, Revised Statutes, which provides that "* * * if the appeal be regularly taken, the cause shall be heard on the merits." That is to say, the whole cause shall be tried, in the appellate court, *de novo.*

The discretion of the justice in assessing the punishment against the defendant was not reviewable on appeal. The appeal was properly dismissed by the circuit court.

Judgment affirmed. All concur.

WILLIAM COOKSEY ET AL., Respondents, v. HENRY C CROOKS, Appellant.

Kansas City Court of Appeals, December 6, 1886.

CASE ADJUDGED.—The court, after having examined the objections urged by appellant, is satisfied that no error was committed, materially affecting the merits of the action.

APPEAL from Grundy Circuit Court, HON. G. D. BURGESS. Judge.

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Affirmed.

GEORGE HALL and A. G. KNIGHT, for the appellant.

I. The statement of plaintiffs' cause of action alleges that they bought the timber of Dennis, but that it was on defendant's land, and as it does not allege that it was Dennis' timber, and as it was on defendant's land, the presumption is that it was defendant's timber, and the statement did not state facts sufficient to constitute a cause of action against defendant. The court, therefore, erred in overruling defendant's demurrer, or objection to the introduction of the testimony offered by plaintiffs. As there was but one instruction asked or given on behalf of plaintiffs, which was given by the court of its own motion, it should have been formed so as to embrace all the issues in the case, which it did not. [The instruction complained of is as follows: "If the jury believe, from the evidence, that defendant and one Dennis entered into a contract, by the terms of which Dennis was to clear the timber and brush standing on thirty acres of land, for and in consideration of said timber; and that Dennis sold to William Cooksey sixteen thousand feet of said timber, and that he afterwards sold the same to the plaintiff, Thomas Cooksey, and that after the same had been cut down and sawed into proper lengths for saw logs, defendant refused to let plaintiff remove a portion thereof and notified him not to do so, they will find for the plaintiff and assess his damages at whatever sum, if anything, they may believe said logs so held by defendant to have been worth, at the time defendant notified plaintiff not to move the same"]. According to plaintiffs' own testimony Dennis was not entitled to remove the timber until the clearing was done, etc. This was an important issue which was wholly ignored by the instruction—the court basing the whole right to recover on defendant's notice to plaintiffs not to

remove the timber. This instruction is, therefore, erroneous. *Crews v. Lackland*, 67 Mo. 619; *Seymour v. Seymour*, 67 Mo. 303; *Bank v. Murdock*, 62 Mo. 70; *Wyatt v. Railroad*, 62 Mo. 408; *Fitzgerald v. Haywood*, 50 Mo. 526.

II. Plaintiffs could not acquire by his purchase from Dennis a right or title to the timber which Dennis did not possess. And as the testimony offered by defendant tended to establish this defence, and the instructions asked for defendant and refused were based upon this testimony, the court erred in refusing these instructions. *Singer v. Goldenberg*, 17 Mo. App. 549; *Maupin v. Mining Co.*, 78 Mo. 24; *Cahn v. Reid*, 18 Mo. App. 116.

N. A. WINTERS, W. W. WITTEN and A. H. BURKEHOLDER, for the respondents.

I. The statement of plaintiffs was sufficient to apprise defendant of the nature of plaintiffs' claim, and is sufficiently specific to be a bar to another action. The presumption, from the facts stated, is, that Dennis was the owner of the timber at the time of the sale to plaintiffs. Proceedings before justices of the peace are regarded liberally as to forms by the policy of the law. *Caldwell v. Fea*, 54 Mo. 55; *Harrington v. Fortner*, 58 Mo. 468; *Iba v. Railroad*, 45 Mo. 469; *City of Kansas v. Johnson*, 78 Mo. 665: *Apitz v. Railroad*, 17 Mo. App. 419.

II. The instruction given for plaintiffs did embrace all the issues. Whether the clearing had been done before plaintiffs attempted to remove the timber sued for was not an important issue in the case, nor one that should have been covered by an instruction on behalf of plaintiffs. The evidence shows that an unconditional sale of the sixteen thousand feet of timber was made to plaintiffs, and that with the knowledge of defendant. *Insurance Co. v. St. Mary's Seminary*, 52 Mo. 480; *Peck v. Ritchey*, 66 Mo. 114; *Maxwell v. Railroad*, 85 Mo. 95.

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III. Even if there was a technical error in the instruction given for plaintiffs (which we deny), it did not prevent substantial and exact justice as to the parties, and there ought not to be reversal on this account. The case was fairly presented to the jury, and unless there was such error as materially affects the merits of the action, the judgment should be affirmed. *Newcomb v. Blakely*, 1 Mo. App. 289; *The State ex rel., etc., v. Edwards*, 78 Mo. 473; *Blewett v. Railroad*, 72 Mo. 583. When the cost of a re-trial would be almost as much as the whole amount in controversy, unless it clearly appears that the jury have been misled to the prejudice of the appellant, this court will not interfere. *Porter v. Harrison*, 52 Mo. 52.

ELLISON, J.—This action was instituted before a justice of the peace for the value of seven thousand feet of saw timber converted by defendant. On appeal to the circuit court plaintiffs recovered judgment, and defendant appeals to this court.

The instruction given by the court was proper, under the evidence in the cause, and that evidence is sufficient to sustain the verdict.

We have examined the objections urged by appellant, and are satisfied no error was committed "materially affecting the merits of the action." Rev. Stat., sect. 3775.

The judgment is, therefore, affirmed. All concur.

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JOHN DEMSKE, Respondent, v. JOHN HUNTER, Appellant.

Kansas City Court of Appeals, December 6, 1886.

1. PRACTICE—MOTION FOR NEW TRIAL—BILL OF EXCEPTIONS MUST SHOW TIME OF FILING AND DATE.—Although the filing of a mo-

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tion for new trial is entered on the clerk's minutes, yet it is not a part of the record proper, unless contained in the bill of exceptions which must also show the filing and date of the motion.

2. ——— ——— CASE ADJUDGED.—Where, as in this case, it appears by the bill of exceptions, after a recital of the rendering of the verdict that "thereupon" the defendant filed a motion for a new trial, etc. *Held*, that the use of the word "thereupon," without more, does not make it appear affirmatively that the motion was filed within the time limited by statute.

On Motion for Rehearing.

3. ——— RECORD OUTSIDE OF BILL.—Notwithstanding the record, outside of the bill of exceptions, may show the filing of motion for new trial, it must appear in the *bill* that it was filed within four days.

APPEAL from Morgan Circuit Court, HON. E. L. EDWARDS, Judge.

Affirmed.

Motion for rehearing overruled.

The case is stated in the opinion.

A. W. ANTHONY, for the appellant.

I. The instructions given for plaintiff were erroneous, and submit issues which were not raised. There was no allegation of fraud or false representations in the petition. *Smith v. Sims*, 77 Mo. 274; *Parker v. Marquis*, 64 Mo. 38. The petition shall contain a plain and concise statement of the facts constituting a cause of action without unnecessary repetition. Sect. 3511, Rev. Stat. If plaintiff had any *right* of recovery, it was upon the ground of the rescission of the contract for fraud or false representation. Such right is a material averment, and a petition without such an averment is fatally defective and no judgment can be rendered upon it. *State to use, etc., v. Matson*, 38 Mo. 489; *Jones v. Fuller*, *Ibid*, 363; *Link v. Vaughan*, 17 Mo. 585.

II. The instructions are squarely *conflicting*. In-

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structions should be *consistent*, or it is error. *Wood v. Steamboat*, 19 Mo. 529; *Henschen v. O'Bannon*, 56 Mo. 289.

III. No one can take advantage of his own moral turpitude or base a right of rescission upon it. *Coppell v. Hall*, 7 Wall. (U. S.) 558; *Thomas v. Brady*, 10 Pa. St. 170; *Mitchell v. Smith*, 1 Binn. 118; *Hall v. Corcoran*, 107 Mass. 253.

B. R. RICHARDSON and DRAFFEN & WILLIAMS, for the respondent.

I. It does not affirmatively appear from the bill of exceptions in this cause, that the motion for new trial was filed within four days after verdict, and no error, not appearing upon the record proper, can be considered by this court. *State to use, etc., v. Savings Bank*, 6 Mo. App. 582; *Haarstick v. Shields*, 8 Mo. App. 601; *State ex rel. Estes v. Gaither*, 77 Mo. 304; *Bollinger v. Carner*, 79 Mo. 318; *Opel v. City of Jefferson*, 67 Mo. 394; *Moran v. January*, 52 Mo. 523.

II. There is no error upon the record proper.

III. Where a party has been induced to make a sale or trade, through the fraud of the other party, he may, upon discovering the fraud, rescind the sale and recover his property in an action of replevin. *Cahn v. Reid*, 18 Mo. App. 115; Wells on Replevin, sect. 318; The plaintiff, before bringing this suit, notified defendant that he had rescinded the trade, which he had been induced to make by defendant's fraud, and offered to return to defendant the mare and money received by plaintiff, and demanded the possession of his horse.

IV. The instructions given at appellant's instance are drawn upon the same theory of those complained of; in such case there will be no reversal for such cause. *Loomis v. Railroad*, 17 Mo. App. 340; *Bettes v. Magoon*, 85 Mo. 580. Upon the real issue in the case the verdict was for the right party. Section 3775, Rev. Stat.; *Gaty v. Sack*, 19 Mo. App. 470; *Julian v. Calkins*, 85 Mo. 202.

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ELLISON, J.—This is an action of replevin in which the plaintiff prevailed and defendant appeals. There was a motion for new trial, but the date of its filing no where appears. All that appears in the bill of exceptions is the following:

"The case then went to the jury, who afterwards brought in their verdict in favor of plaintiff. Thereupon the defendant filed his motion for a new trial in words and figures, as follows, to-wit (here follows motion), which said motion the court overruled, and to the opinion of the court in overruling same the defendant at the time objected and excepted."

It has been held that while the filing of a motion for new trial is entered on the clerk's minutes yet it is not a part of the record proper, but such filing and the date thereof, must be shown by the bill. *State ex rel. Estes v. Garther*, 77 Mo. 304. It has also been determined that the bill of exceptions must show such filing to have been within the four days prescribed by the statute. *Lessee v. Carondelet*, 6 Mo. App. 582; *Haarstick v. Shields*, 8 Mo. App. 601; *Bollinger v. Carner*, 79 Mo. 318.

The question, then, in this case is, does the statement following a recital of the rendering of the verdict that, "thereupon" the defendant filed a motion for new trial, without other reference as to time or date, cover the requirement of the law. "Thereupon" in the connection here used, may mean immediately, and it may mean by reason of, or in consequence of. That is, by reason of the rendition of the verdict or in consequence of it, the defendant at *some time* afterwards filed his motion. The use of the word "thereupon" without more, does not then make it appear affirmatively that the motion was filed within the time limited by statute. We cannot, therefore, take notice of the bill of exceptions in this case, and, discovering no error in the record proper, we affirm the judgment. All concur.

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Motion for Rehearing.

The motion for rehearing in this cause is based on three grounds, neither of which we consider tenable.

I. Notwithstanding the record outside the bill of exceptions may show the filing of motion for new trial it must yet appear in the *bill* that it was filed within four days. *State ex rel. Estes v. Gaither*, *supra.* So "in the absence of a bill of exceptions, it *cannot* appear that a motion for new trial was filed in time." *Haarstick v. Shields*, *supra.*

II. The authorities cited in the original opinion, when taken together, show that it must be made to appear by the bill, that the motion was filed within four days. The word "thereupon" does not so show it. As defined by the lexicographers it may mean it was within four days or it may mean no fixed period. There is no necessity for experiments in matters of this sort. The date of the filing should have been given or the statement should have been made that it was within the four days allowed by law.

III. It is next asserted that, though there was no motion for new trial, we must nevertheless consider the exceptions set forth in the bill; it being said that the opinion in this cause is in conflict with *Fin v. Rogers*, 15 Mo. 315; *Wagner v. Jacoby*, 26 Mo. 530; *Prince v. Cole*, 28 Mo. 486; and *Gray v. Heslop*, 33 Mo. 243. It has been repeatedly held by the supreme court that unless there be a motion for new trial incorporated in the bill of exceptions no errors outside the record proper will be noticed. *Robinson v. Hood*, 67 Mo. 660, and cases cited.

The motion for rehearing, with the concurrence of the other judges, is overruled.

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FRED LAMMERS, Respondent, v. WHITE SEWING MACHINE COMPANY, Appellant.

Kansas City Court of Appeals, January 10, 1887.

ALTERATION — EFFECT OF — RATIFICATION —Where in the case of a written order, a blank space was filled by the payee, after its acceptance and without the knowledge or consent of the acceptor, but with the knowledge of plaintiff, this was such an alteration as rendered the acceptance void, unless, with knowledge thereof, it was *afterwards* ratified. Evidence to the fact of ratification is for the jury,

APPEAL from Jackson Circuit Court, HON. TURNER A. GILL, Judge.

Affirmed.

The case is stated in the opinion.

SCAMMON & STUBENRAUCH, for appellant.

I. The court erred in not sustaining the demurrer to the evidence. It appeared that an alteration was made in the order after its acceptance by the company, at plaintiff's suggestion, and there was no evidence of the knowledge of it by the company until after suit brought, or that the company ratified it. This made the order a nullity and no recovery could be had on it. *Haskell v. Champion*, 31 Mo. 136; *Evans v. Foreman*, 60 Mo. 449; *Moore v. Hutchinson*, 69 Mo. 429; *First Nat. Bk. of Springfield v. Fricke*, 75 Mo. 170; *Hord v. Laubman*, 79 Mo. 101.

II. In order to show *ratification* it must be made to appear that there was full knowledge of the alteration, and a manifest intent to ratify it. *Cutler v. Rose*, 35 Iowa, 456; *Evans v. Foreman, supra.*

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III. The order itself was made on a particular fund, and there was no evidence showing that the fund had been realized upon; hence there could be no recovery. *Pettis Co. v. Kingsbury*, 17 Mo. 479; *Ford v. Angelrodt*, 37 Mo. 50.

IV. The order being shown to have been altered without the acceptor's consent, and not afterwards ratified, the same was incompetent, as evidence. 1 Greenl. Evid. [8 Ed.] sect. 564; *Whitmer v. Frye*, 10 Mo. 348.

V. The evidence of what the drawers of the order made, except in February, which was the only month connected with the order, should not have been admitted.

VI. The jury utterly disregarded the second instruction by the court. The court should have set aside the verdict, because it was against the evidence.

Jewell & Thompson, for the respondent.

I. An immaterial alteration does not affect the validity of a written instrument. The alteration must be *material* to affect the instrument, and all the cases cited by defendant were such as were *held* to be material. The remarks of the court in the case of *Springfield Bank* and the *Hord case* must be considered mere *obiter dicta*. *Briggs v. Glenn*, 7 Mo. 572; *Ivory v. Michael*, 33 Mo. 398; *Trigg v. Taylor*, 27 Mo. 245; *Britten v. Dieskee*, 46 Mo. 591; *Presbury v. Michael*, 33 Mo. 542; *Owings v. Arnot*, 33 Mo. 406; *Am. Nat. Bk. v. Bangs*, 42 Mo. 450; *Wash. Sav. Bk. v. Ecky*, 51 Mo. 272; s. c., 7 Mo. App. 283.

II. No instrument is rendered void by an alteration which does not vary or affect the meaning. The insertion in this case making "the month of February" to read the "the month of February 1st," is wholly meaningless. No effect or meaning can be given the word "1st" in this connection, and in construing the order it must simply be rejected as surplusage. 7 Mo. App. 283.

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III. The jury, under the instructions, either found that no alteration was made at request of plaintiff, or that it had been ratified by defendant.

IV. There was evidence showing that there were funds such as designated in the order. The promise to pay it was an admission of funds.

ELLISON, J.—This suit was originally brought in justice's court, where the plaintiff below, the appellee here, had judgment.

An appeal was taken to the circuit court, where judgment upon the verdict of the jury, again went for the plaintiff.

The suit was upon the following order:

"KANSAS CITY, Jan. 9, 1884.

"J. G. CROMPTON, Agent White Sewing Machine Co.

"Please pay to Lamars & Howe, thirty dollars out of our commission account for the month of February 1, 1884.

"ROBINSON & DANIELS."

This order was endorsed across the face as follows: "Accepted. J. G. Crompton, Manager Retail Dept."

The evidence showed that, "1st" was interlined in the above order, after the word February, without the knowledge or consent of Crompton, who had accepted it, but with the knowledge of plaintiff.

This was such an alteration as rendered the acceptance void, unless, with knowledge thereof, it was afterwards ratified. *Haskell v. Champion*, 31 Mo. 136; *Evans v. Foreman*, 60 Mo. 449; *Moore v. Hutchinson*, 69 Mo. 429; *First Nat. Bk. v. Fricke*, 75 Mo. 170; *Hord v. Laubman*, 79 Mo. 101.

The trial court gave an instruction embodying this rule of law, but defendant claims there was no evidence tending to show a ratification, and, therefore, the

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demurrer to the testimony should have been granted. The only evidence of ratification was that plaintiff presented the order to Crompton for payment; that Crompton "took it and looked at it, and said it was all right." That he presented it twice afterwards, Crompton excusing himself from payment by saying his book-keeper had not caught up. And that afterwards Crompton paid five dollars on the order. The witness stated he did not call attention to the alteration, and could not swear that Crompton saw it. Crompton himself testified that he did not notice the alteration. I am of the opinion this was evidence sufficient to go to the jury, for their judgment on the issue of fact it makes up, and they having found for plaintiff, we will not disturb the result. The other points made against the judgment are not sufficient to justify us in its disturbance, and we, therefore, order its affirmance. All concur.

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STATE OF MISSOURI EX REL. COLE, Respondent, v. JOHN SHOBE ET AL., Appellants.

Kansas City Court of Appeals, December 6, 1886.

1. **PRACTICE — EXCEPTIONS, WHEN WAIVED.**— All exceptions not brought to the attention of the trial court in a motion for a new trial are deemed *waived*.

2. ——— **TRIAL BY COURT—INSTRUCTIONS.**—Where the case is tried by the court, without the intervention of a jury, this court will pay but little regard to the action of the court in giving or refusing declarations of law, except in so far as they indicate the theory upon which the court tried the case.

3. **ATTACHMENT—SUIT ON BOND—EXPENSES.**—In a suit upon bond in attachment, the relator is entitled to recover, on the bond, for any direct loss, damage, or expense produced or occasioned, and this will include traveling expenses in attending to the attachment suit.

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APPEAL from Bates Circuit Court, HON. JAMES B. GANTT, Judge.

Affirmed.

The case is stated in the opinion.

M. A. FYKE, for the appellants.

I. The court erred in striking out the amended answer of defendants, Shobe and Johnson, and the separate answer of Johnson. Sects. 3521, 3522, Rev. Stat.; *Ashby v. Shaw*, 82 Mo. 76; *Dyas v. Hanson*, 14 Mo. App. 363. The insolvency and non-residence of plaintiff alleged in the answer and admitted by the motion, afforded sufficient grounds for entertaining the answer as an equitable set off. *Barnes v. McMullins*, 78 Mo. 260; *Field v. Oliver*, 43 Mo. 200; *Fulkerson v. Davenport*, 70 Mo. 541.

II. The court erred in the admission of testimony as to attorney's fees *paid* by plaintiff, and as to the amount of traveling expenses paid by him. His own evidence showed that he was at the time a resident of Moniteau county, Missouri. Also in admitting depositions of a witness as to his attendance on the trial and the expenses thereof, and the payment of the same by plaintiff. Defendants could not be held liable for such expenses.

III. The court erred in refusing defendants, instructions involving important issues, and justified under the law applicable to this case.

MOORE & WILLIAMS, for the respondent.

I. The new matter in the amended answer was properly stricken out. The granting of amendments is always discretionary with the trial court. *Ensworth v. Benton*, 67 Mo. 622. The matter stricken out constitutes no defence, and is not pleaded as a counter-claim, but as a defence. *Kinney v. Miller*, 24 Mo. 516; Bliss

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Code Plead. sect. 367; *Bates v. Rosekrans*, 37 N. Y. 410; *Stowell v. Eldred*, 38 Wis. 614. The matter stricken out was contradictory to and inconsistent with the general denial. To entitle defendants to any off-set, they must admit in the answer a cause of action upon the attachment bond. Sect. 409, Rev. Stat.; *Fugate v. Pierce*, 49 Mo. 441. The matter set up is unliquidated damages sounding in tort, and does not grow out of this action. *State ex rel. v. Eldridge*, 65 Mo. 584; *Johnson v. Jones*, 16 Mo. 494; *Pratt v. Menkins*, 18 Mo. 158; *McAdow v. Ross*, 53 Mo. 199; *Field v. Oliver*, 43 Mo. 200.

II. The motion for a new trial does not make this point, the striking out of answers. *McCord v. Railroad*, 21 Mo. App. 92.

III. There was no error in the admission of evidence. The damages claimed were reasonable, and the court made its finding from a consideration of all the evidence. Drake Attachments, sects. 175, 176. It was the right of plaintiff to abandon his residence in Missouri for one in Kansas, and to give up his intent to return to this state, as he had done before the case was tried. Even a witness could do that and recover mileage. His traveling expenses were properly included. *State to use, etc., v. Beldsmeier*, 56 Mo. 226.

IV. Defendants are responsible for interest to the relator, and they have nothing to do with his claim against other parties. *State, etc., v. Beldsmeier, supra.*

HALL, J.—John Shobe and J. M. Johnson, as partners under the firm name of Shobe and Johnson, brought suit by attachment against P. B. Cole, on a contract respecting the caring for and the feeding of certain cattle owned by Shobe and Johnson. The ground of attachment was non-residence. The usual bond was given by Shobe and Johnson with their co-defendants in this action as surety. Cole did not file a plea in abatement, but pleaded to the merits with the result that Shobe and

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Johnson took a non-suit. After such termination of the attachment suit Cole, in the name of the state, instituted this action against Shobe and Johnson and their surety on the attachment bond.

The surety, Collins, made as his separate answer to the petition a general denial. Shobe and Johnson filed a joint separate answer. Said answer contained a general denial, and next set up what is denominated by counsel for defendant an equitable set-off, growing out of the contract on which the attachment suit was based. The special defence thus pleaded was stricken out by the court on the motion of plaintiff, and need not be noticed further by us, for the reason that the action of the court in respect of it was not set up in the motion for a new trial as one of the reasons therefor. And we may make the same remark concerning the special defence, of the same character, set up in the separate answer of the defendant, Johnson, which was also stricken out by the court. "All exceptions not brought to the attention of the trial court in a motion for a new trial are deemed waived." *McCord v. Railroad*, 21 Mo. App. 93, and cases cited; *Fox v. Young*, 22 Mo. App. 386; *Putnam v. Railroad*, 22 Mo. App. 592.

Against the defendants' objections the court permitted Cole to testify to the amount expended by him in procuring the attendance of two witnesses from Kansas at the trial of the attachment suit. The relator admitted that the depositions of such witnesses had been taken and were on file in the court, in which the attachment suit was tried. And on this question the court declared the law to be that if such were the facts the relator could not recover on account of the expense of procuring the attendance of said witnesses. The defendants were not injured by the admission of said testimony. And we need not consider the objections made to its introduction.

The attachment suit was begun on September 22, 1882; the non-suit was taken on April 15, 1884. W. M.

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Doyle, who owed Cole about $940, was garnisheed; no other property was attached. The court permitted the relator to testify to the amount paid by him to his attorneys for collecting the Doyle debt. Doyle died during the pendency of the attachment suit. After the termination of the attachment suit the relator, as he himself testified, assigned the claim against Doyle to one of his attorneys for collection and to secure their fee. The court upon this question, at the request of the defendants, declared the law to be that if the relator had assigned said claim to one of his attorneys before the same was probated, then relator could not recover attorney's fees for collecting said claim from the Doyle estate. The court under said declaration of law and the evidence could not have allowed the relator anything on account of said attorney's fee, and, hence, the testimony relating thereto did the defendants no harm.

The defendants introduced a certified copy of the claim as made out and presented to the probate court for allowance against Doyle's estate. It was thus shown that on April 17, 1884, Cole assigned said claim for value received to John W. Moore, who was one of his attorneys. It was also made to appear that interest from September 16, 1882, to May 1, 1884, amounting to $8.40, was asked and allowed on said claim. The court was asked by the defendants, but refused to declare the law to be, "that, if Moore, to whom the claim against Doyle was assigned, made claim for interest to the amount of $8.40 in the probate court, and that said amount was allowed as interest from September 16, 1882 to *May*, 1884, then the relator cannot recover interest on account of the attachment of said money in Doyle's hands."

This case was tried by the court without the intervention of a jury, and we shall pay but little regard to the action of the court in giving or refusing declarations of law except in so far as they indicate the theory upon which the court tried the case. While the garnishment remained undisposed of the money due from Doyle to

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Cole was in the custody of the law. The garnishment had the effect to prevent the garnishee from paying his debt to Cole. During the pendency of the attachment suit said debt, which was a debt due on an account, did not draw interest. The loss of such interest constituted one item of damages recoverable in this action. *State to use v. Beldsmeier et al.*, 56 Mo. 227. Interest during such time Doyle did now owe, and, hence, the assignment of the claim against Doyle did not carry such interest with it. It does not clearly appear for just what time the claim for interest was made and allowed, but it certainly was not for the nineteen months during which the attachment suit pended. Not only did Doyle not owe interest for said period of time, but the interest for said time was many times larger in amount than the sum of $8.40. Every intendment should be made by us in favor of the action of the circuit court. The time mentioned, for which the claim for interest was made, extended beyond and past the time at which the attachment suit terminated, and presumably was allowed for some time subsequent thereto. But in any event, the assignee of the claim against Doyle was not entitled to the interest on the claim for the time during which the attachment suit pended. The court properly refused the declaration of law asked. If, as the relator testified, he lost the interest on said claim for said time, it would have been proper for the court to have allowed such interest at the rate of six per centum per annum as damages in favor of the relator.

The court permitted the relator to testify to the sums paid by him to his attorneys for defending against the attachment suit. The defendants objected to such testimony, for the reason, among others, that the relator could only recover what were reasonable attorney's fees and not what he paid. The relator afterwards introduced evidence as to what were reasonable attorney's fees for the services rendered by the relator's attorneys in the attachment suit; and the defendants also intro-

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duced evidence in relation thereto. This mode of proof was proper.

At the time of the institution of the attachment suit the relator was a citizen of Missouri, but was temporarily residing in Barber county, Kansas, with his family, where for a time they lived in a tent, engaged, as it appears, in caring for and grazing cattle. The court permitted the relator to testify to the number of trips made by him from his temporary residence in Kansas to Missouri to attend to the attachment suit, and the amount expended by him in so doing. The defendants, upon this question, asked and the court refused to declare the law to be, "that if the court finds from the evidence that defendant at the time the suit was brought was a resident of Moniteau county, Missouri, and afterwards removed to Barber county, Kansas, he cannot recover traveling expenses from said Barber county in attending said cause."

The action of the court in the respect last named was correct. The relator "was entitled to recover on the bond for any direct loss, damage, or expense produced or occasioned" by reason of the attachment, or any process or proceeding in the suit, or by reason of any judgment or process thereon." *State to use v. Beldsmeier et al., supra.* This language is sufficiently comprehensive to include the sums expended by him in attending the attachment suit under the facts in this case. It is not necessary to consider the declaration of law as an abstract proposition of law. There was no evidence to support or warrant it. No one testified upon this subject, so far as it appears from the abstract of the record, except the relator himself. He considered Missouri his home, at the time the attachment suit was begun, but was in fact then living in Kansas. The relator was entitled to recover the amount expended by him in attending the attachment suit under such facts.

It may be that the court should not have allowed the relator the entire amounts expended by him in going from Kansas to the place of trial, for the reason that

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during his visits to Missouri he seems to have attended to other business than the attachment suit. But it does not appear from the record that the court did allow such entire amounts. On this point no declaration of law was asked or given. We assume, the contrary not appearing, that the court made such allowance as was reasonable and just.

We find no error in the record. The judgment is affirmed. All concur.

JOHN KAMERICK, Respondent, v. LEWIS CASTLEMAN ET AL., Appellants.

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Kansas City Court of Appeals, December 6, 1886.

1. **PLEADING—COUNTER-CLAIM—WHEN ADMISSIBLE TO BE PLEADED AND SET UP.**—All independent express contracts, whether liquidated or unliquidated, are the subjects of counter-claim; and in all that class of cases in which a tort has been suffered and the law permits the sufferer to waive the tort and sue in *assumpsit*, and he prefers the latter, then a counter-claim may be made arising under the same contract. And where the actor elects to sue in tort, springing out of a contract, pleaded as inducement, the defendant should be allowed a counter-claim growing out of plaintiff's breach of that contract.

2. **LANDLORD AND TENANT—LEASING OF LAND FOR SHARE OF CROP—EFFECT OF.**—In the case of a contract for a lease of land, for a certain share of the crops to be grown upon it, it constitutes the parties to the lease tenants in common of the products of the farm, with the possession established by the relation of landlord and tenant. And the landlord has the right to enter the premises for the purpose of gathering and dividing, but not to regain possession by force or violence; and where he resorts to force he becomes a trespasser *ab initio*.

APPEAL from Cooper Circuit Court, HON. E. L. EDWARDS, Judge.

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Reversed and remanded.

Statement of case by the court.

This is an action in trespass, for wrongfully entering the close of plaintiff, and the consequent loss of a crop of corn standing in the field. The petition alleges that the plaintiff rented from the defendant, Castleman, certain lands for the year, beginning March 1, 1884, and ending March 1, 1885. That plaintiff had cultivated thereon a large crop of corn, which was standing in the field, matured, on the twenty-third day of October, 1885, when one Parish, the constable of the township in which said premises were situate, under a pretended writ of entry from a justice of the peace, wrongfully and unlawfully, and with force and arms, put plaintiff off of the premises, and thereby plaintiff lost a crop of corn, by reason of which he was damaged, etc. That said pretended writ of entry was without warrant of law and void; that the constable before executing the same demanded of the plaintiff therein, said Castleman, an indemnifying bond, who thereupon executed such bond with the other defendants, Thomas Wallace and George Cockrell, as sureties; and that said defendants incited and instigated the said constable to commit the wrong and trespass complained of.

The petition, as to said constable, was dismissed before trial. Cockrell and Wallace made answer tendering the general issue. Castleman answered separately, tendering the general issue, and pleading specially the contract of rent between him and plaintiff, whereby he had left to plaintiff, in February 1884, certain lands, on which the alleged trespass was committed, to be cultivated that season by plaintiff in corn, oats and wheat, on the shares. This defendant also pleaded that plaintiff had failed to perform the said contract on his part, to defendant's damage, which was set up as a counter-claim. On motion of plaintiff this counter-claim was

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stricken out. On trial had before a jury, the evidence tended to show that in February, 1884, the defendant, Castleman, the owner of the premises in question, entered into a written contract with plaintiff, whereby he let to plaintiff certain fields and lands, to be cultivated in corn, oats and wheat, on the shares, the particulars of which more fully appear in the opinion of the court.

The defendant, Castleman, prior to the alleged trespass, claiming that plaintiff was in default in his rental, began action against him in a justice's court, under the landlord and tenant act. Judgment was rendered therein in favor of Castleman for the amount of money claimed, but the judgment entered by the justice did not contain any award of restitution of the premisis. On the writ of *fi fa* issued thereon the justice, however, made an order of restitution. It was under this writ that the constable delivered the possession of the premises to Castleman.

There was much evidence, *pro* and *con*, and as to the value of the corn and the amount taken by Castleman. Under an instruction from the court the jury were authorized to find for plaintiff the full value of the corn so taken or destroyed. The jury returned a verdict for plaintiff in the sum of four hundred and eighty dollars. From this judgment defendants have appealed.

GEORGE A. CASTLEMAN, COSGROVE & JOHNSTON and W. B. PENDLETON, for the appellants.

I. The counter-claim set up in answer was good in this action, and it was error to strike it out. *McAdow v. Ross*, 53 Mo. 199; *Richie v. Hayward*, 71 Mo. 560; *Emery v. Railroad*, 77 Mo. 339.

II. Castleman and Kamerick were tenants in common of the corn, under the agreement to share the crops grown upon the land in lieu of rent. *Steward v. Doughty*, 9 Johnson (N. Y.) 108; *Hatch v. Hart*, 40 N. H. 98; *Smith v. Tankersley*, 20 Ala. 215; *Walls v. Preston*, 25 Cal. 59; *Johnson v. Hoffman*, 53 Mo. 504.

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It was, therefore, error for the court to instruct for the full value of the corn.

III. Castleman was also tenant in common of the lands. He held them in common with Kamerick. *Harrower v. Heath*, 19 Barb. 331; *Foote v. Calvin*, 3 Johnson (N. Y.) 216.

IV. Defendants, Wallace and Cockrell, had not any actual connection or participation in the alleged trespass, and are connected therewith constructively by reason of signing the bond of indemnity to the constable for the execution of the supposed writ of possession of the land. Putting Castleman into possession of the land did not affect the tenant's possession and right to the crop. *Parris v. Frink*, 49 N. Y. 24; *Daniels v. Brown*, 34 N. H. 494.

V. A tenant in common of the crop, Castleman had a right to enter *peacefully* upon the land and take the corn, and for such action cannot be held at all in trespass. *Fiquet v. Allison*, 12 Mich. 331; *Daniels v. Brown*, 34 N. H. 494.

DRAFFEN & WILLIAMS, with J. F. TAYLOR, for the respondent.

I. There was no error in striking out the counter-claim set up by Castleman. Plaintiff's action was for tort, and did not spring from, and was in no manner connected with a contract. The counter-claim did not "arise out of the transaction set forth in the petition, as the foundation of plaintiff's claim, nor was it connected with the subject of the action." Whittlesey on Pract., sect. 190; Pomeroy's Rem. Rights, sect. 788; *Richie v. Hayward*, 71 Mo. 560; *People v. Dennison*, 84 N. Y. 272; *Barnes v. McMullins*, 78 Mo. 260.

II. The relation of landlord and tenant existed between the defendant, Castleman and plaintiff, notwithstanding the rent was to be paid by a part of the crop. Where possession of the land is given, it is held to create a tenancy. *Johnson v. Hoffman*, 53 Mo. 504; *Alwood v. Ruckman*, 21 Ill. 200.

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III. The terms of the agreement were broad enough to give plaintiff the sole possession of the land, and the actions of the parties show that such was their intention. *Taylor v. Zapp*, 14 Mo. 489.

IV. In any view of the matter plaintiff was entitled to a verdict. He is entitled to recover the value of the corn. He was the owner thereof until Castleman's rent was set off to him. *Atwood v. Ruckman*, *supra;* Waterman on Trespass, sect. 967. Defendant, Castleman, having wrongfully evicted plaintiff was not entitled to rent. Taylor on Landlord and Tenant, section 378.

V. The defendants, Cockerill and Wallace, having signed the bond of indemnity, are liable in this action. *Wetzel v. Waters*, 18 Mo. 396; *Ball v. Loomis*, 29 N. Y. 412.

VI. The proceedings under which this action was taken were manifestly void. Defendant took the crops and used them, and by the action of the lower court is required to pay for them.

PHILIPS, P. J.—I. The first question, in order of proceeding in the trial court, for determination is, the correctness of the action of the court in striking out the counter-claim. The contention of respondent is that the action is not founded on the contract of rent, but is in tort, for the wrongful entry and appropriation of plaintiff's corn; and that where the action is purely in tort a counter-claim predicated on contract between plaintiff and defendant is not permissible. As an abstract proposition this may be true, but the tort may be so connected with and dependent upon the existence of the contract as to connect the counter-claim sufficiently with the subject of the action as to admit it.

The case of *People v. Dennison* (84 N. Y. 272), cited by respondent, was an action of fraud. The defendant contracted with the state of New York for doing certain work in the construction of a canal. The defendant procured, by false representations from his engineers, false and fraudulent certificates and vouchers

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as to the work, whereby he defrauded the state out of large sums of money. The action by the people was based solely on the fraud, to recover back money thus obtained from the people, independent and outside of the contract. The defendant set up as a counter-claim a sum due him on his contract with the people. It was disallowed, on the ground that the action was on the fraud wholly disconnected from the contract.

The case of *Barnes v. McMullin* (78 Mo. 260), holds that a counter-claim based on the fraud and deceit practiced by plaintiff in procuring a contract of sale, and not for a breach of the contract, could not be entertained where the plaintiff's action was based upon a promissory note having no connection with the contract of sale. But the learned commissioner, who wrote the opinion, also held, that all independent express contracts, whether liquidated or unliquidated, are the subjects of counter-claim, and that in all that class of cases in which a tort has been suffered, and the law permits the sufferer to waive the tort and sue in *assumpsit*, and he prefers the latter, then a counter-claim may be made arising under the same contract.

The converse of this proposition must be equally correct, that where the actor elects to sue in tort, springing out of a contract, pleaded as inducement, the defendant should be allowed a counter-claim growing out of plaintiff's breach of that contract.

Our practice act provides that the defendant may plead as a counter-claim "a cause of action arising out of the contract or transaction, set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

In *Empire Transportation Company v. Boggiano et al.* (52 Mo. 294), the company sued defendant to recover a charge for the transportation of certain goods over its line. The answer set up as a counter-claim damages resulting from plaintiff's negligence as a common carrier in transporting certain fruit for defendant.

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It was urged against the counter-claim that the negligence of a common carrier, being a common law liability, and the subject of an action in tort, could not be pleaded as a counter-claim. The court say: "Although the plaintiff's liability in this case is for a tort growing out of the negligence and delay as a common carrier in the transportation of the defendant's goods, the cause of action, so far as the defendant is concerned, arises out of the contract of affreightment, and hence in declaring at common law for the tort, the contract was always alleged in the declaration by way of inducement, So under our statute the contract must be alleged as the inducement to the cause of action, and as showing the parties, connection with the case. In this light the contract is looked to as the origin of the cause of action. The statute contemplated that where a suit is founded on a cause of action connected, in any manner, with a contract, a counter-claim arising out of any other contract between the same parties may be set up. * * * It is sufficient if the defendant's right to the damages relied on as a counter-claim grows out of a contract between him and plaintiff."

In *McAdow v. Ross et al.* (53 Mo. 199), one Smallwood, as the owner of the property, contracted with one Ross to make certain building improvements thereon. McAdow furnished certain materials which were used therein by Ross. In an action by McAdow to enforce a mechanic's lien on this property for said materials, Smallwood answered that plaintiff became surety on the contract between him and Ross, whereby he guaranteed the faithful execution of the work by Ross, and pleaded as a counter-claim damages resulting from Ross' failure to keep and perform his contract. It was held to be admissible, as being "connected with the subject matter of the action." The court say: "If the claim be for a debt, or damages growing out of the subject of the action, or arise out of the transaction set forth in the petition as a ground of action, it is enough." In support

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of the rule the case of *Curtis v. Barnes* (30 Barb. 225), is cited. There the parties submitted a matter in controversy to arbitration, but before the hearing was completed the plaintiff withdrew therefrom, and brought suit on his claim. The defendant was allowed to plead as a counter-claim damages consequent upon plaintiff's abandonment of the submission to arbitration. While the action of McAdow cannot be said to have grown out of any contract between him and Smallwood, but is rather a statutory remedy enforceable against the property of the owner, the counter-claim obtained as growing out of the breach of the contract between Ross and Smallwood, for which McAdow vouched, and as being connected with the subject of the action, as its initial ground.

The case of *Ritchie v. Hayward* (71 Mo. 560), is certainly authority against the broad proposition, that where the action is in tort, a counter-claim will not lie. That was an action in trover for the wrongful conversion of certain gunny sacks. The defendant answered that the plaintiff had contracted with him for the sale and delivery of a quantity of potatoes of a given quality, to be delivered in gunny sacks. That plaintiff sent him potatoes in the sacks in controversy, but the potatoes were of an inferior quality, and asked damages, by way of counter-claim for the breach of contract. The court, through Hough, J., said: "If the facts stated by the defendant be true he certainly has a cause of action against the plaintiff. It is not, however, a cause of action arising out of any contract set forth in the petition, for no contract is therein set forth. The facts set forth in the petition are, that the defendants came into the possession of certain sacks of the plaintiff and wrongfully converted them to their own use. The details of the transaction, the evidential facts, are not stated, but the ultimate facts only, those which will entitle the plaintiff to relief, when established by other facts at the trial. * * * It (the transaction)

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must be held to include all the facts and circumstances out of which the injury complained of by him arose, and if these facts and circumstances also furnished to the defendant a ground of action, against the plaintiff, the defendant will be entitled to present such cause of action as a counter-claim, showing by proper averments that it is a part of the same transaction which is made the foundation of the plaintiff's claim. In this view of the case, it is immaterial what form of action is adopted by the plaintiff." The court then cite approvingly Pomeroy on Remedies, section 788: "Whenever the facts are such that an election is given to the plaintiff to sue in form either for a tort or on contract, and if he sues on contract, the defendant may counter-claim damages for the breach of that contract, the same counter-claim may also be interposed when the suit is in form for the tort." The principle of these cases is recognized, if anything in a more extreme degree, in *Emery v. Railway Company* (77 Mo. 339.)

The petition in the case at bar, by way of inducement, alleges the contract of lease. It also refers to the proceeding in the justice' court under that contract, which led to the writ of ouster. The theory on which plaintiff tried his case below, and on which he insists on this appeal, is that the contract was one of lease for a year. Even if it be for the season, as contended by defendants, although that contract contained no express provision for quiet enjoyment, it arises from implication in all such transactions. "It is to be understood as a condition of his (the lessor's) right to demand rent, that the lessee shall not be disturbed in his possession of the demised premises during the term by the lessor." Taylor L. & T., sect. 304 (7 Ed.)

Manifestly, therefore, for the wrongful invasion of plaintiff's possession by Castleman the latter had his election to sue on the contract or for the tort. By electing to pursue the latter remedy, he could not, according

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to the authorities *supra*, cut off the defendant's right to counter-claim for damages growing out of the breach of contract of rent.

As will appear from a subsequent part of this opinion, the plaintiff's action is in trespass for the wrongful and forcible entry on the land, with consequent injury to the crop, thus making the injuries resulting to the possession and the personal property inseparable. The plaintiff's whole cause of action is bottomed on the contract of lease. It is that which gave him the right of possession, which he claims has been invaded. It is that which gave him a right to claim the corn grown on defendant's land. It must, therefore, follow that when he invokes the contract, as the foundation of his claim, a counter-claim growing out of his own breach of that contract must obtain, as being connected with the subject of the action.

The statute allowing counter-claims was designed to prevent multiplicity of suits. It should be liberally construed, and the rules respecting its application are constantly broadening.

Our conclusion is that the trial court erred in striking out the plea of counter-claim.

II. As this is an action in trespass, and the plaintiff recovered, under the instruction of the court, the whole value of the corn taken, the important question to be determined is, was the plaintiff so far the exclusive owner, or entitled to the exclusive possession, of the property as to authorize the recovery? This involves the construction of the contract between Kamerick and Castleman. It opens with the statement, that "Lewis Castleman has this day let to John Kamerick certain lands," on a given side of a public road. Part of the land was to be cultivated in corn, part in oats and part in wheat. That portion respecting the corn is as follows:

"It is to be thoroughly broken and cultivated, ploughed once a week, if it is not too wet, until ready to 'lay by,' and when ready to gather, is to be gathered

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and divided in the proportion of two-fifths to Castleman and three-fifths to Kamerick, or forty bushels to Castleman and sixty bushels to Kamerick out of every hundred bushels of corn gathered and cribbed and penned." It then provides for good husbandry, and the return of the premises to plaintiff in good condition, etc.

It is observable that no time is fixed by the contract for the termination of the letting. Nor is there any stipulation as to who shall gather the corn, nor requiring plaintiff to make delivery to Castleman of his share. And what gives some significance to this silence of the contract, respecting the harvesting and delivery, is the fact that the clauses of the contract respecting the oats and wheat do contain such provisions. The first conclusion of law is, that this contract is to be viewed as one for the cropping season only. The petition alleges that the trespass was committed on the twenty-third day of October, 1884, and that "said corn was standing in the said field *fully matured.*" The corn had then ceased to draw nourishment from the soil. It was no longer held for cultivation by plaintiff. It was ready to be gathered and divided. In the absence of any express stipulation as to who should gather and divide, the presumption is that each should gather his own share and the division should be made mutually. And as a necessary sequence to this, each, after the maturity of the crop, would have the right of ingress and egress, to gather and divide. The tenancy of defendant of the land on which the corn was grown was practically at an end, after allowing a reasonable time for the gathering and division. What, then, was the legal right and relation of Castleman to this corn at the time he entered?

There is much discussion in the reported cases touching this question, as to whether the parties are to be regarded as tenants in common of the crop as of a chattel. There are courts of high authority which hold that notwithstanding the rent is to be paid in a share of the crop grown, where the tenant is to have the pos-

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session of the land, the tenant and landlord are not to be treated as tenants in common, that until division is made the tenant is entitled to the exclusive possession. Principal among the courts so holding is that of Indiana. See *Railroad v. Lilard*, 94 Ind. 313, 48 Am. Rep. 155, where the authorities are reviewed.

On the other hand there are courts of high authority which hold that where there is a letting, providing that all crops shall be divided in given shares in payment for the use, the contract takes effect by way "of reservation, and the share reserved is always the property of the owner of the land, without severance or delivery, though both of them be stipulated for;" that where the reservation is of an undivided share, the property of that undivided share is in the lessor, and the residue is in the tenant, and they are, therefore, tenants in common of the whole until division is made. *Hatch v. Hart*, 40 N. H. 93; *Putnam v. Wise*, 1 Hill, 234; *Bernal v. Havious*, 17 Cal. 542; *Lowe v. Miller*, 3 Gratt. 205; *Smyth v. Tankersley*, 20 Ala. 212; *Taylor v. Bradley*, 39 N. Y. 129.

In *Alwood v. Ruckman* (21 Ill. 200), the more conservative doctrine is announced, that under such a contract the relation of landlord and tenant does not necessarily arise, but the parties may be tenants in the crop. Much depends upon the terms of contract of letting, whether for a term of years or for a year, indicating the tenant's right of exclusive possession until division be made.

In *Johnson v. Hoffman* (53 Mo. 508) our supreme court hold that this is a question to be much determined from the peculiar facts and circumstances of each case. The contract of lease in that case clearly indicated an actual lease, for it not only employed the apt words, but stipulated for a term of three years. The tenant was to have one half of the crops grown. The court say: "The crops, however, were to be divided between the parties. They were, therefore, ten-

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ants in common of the products of the farm with the possession of the land in the plaintiff as the tenant of the defendant as his landlord. * * * The rights of the defendant in the crops, as tenant in common, were not inconsistent with their relations as landlord and tenant. Whether plaintiff was entitled to the possession of the place or not, the defendant was entitled to the possession of his share of the crops." Even the court in Indiana, which has gone to the farthest extent in denying the joint ownership in such crops, concedes that where the contract merely provides for cultivation by the tenant until the crop is laid by, and there is no provision requiring further delivery by the tenant, the landlord becomes the owner of his share after the laying by. *Hart v. State*, 29 Ind. 200; *Lindley v. Kelly*, 42 Ind. 294.

In the case at bar the letting was only for the farming season. The plaintiff was to plough until "laid by." He was not required to make any delivery. The corn was "fully matured," awaiting gathering.

Under such state of facts we do not hesitate to hold, on the great weight of authority, and especially on the language of our supreme court in *Johnson v. Hoffman* (*supra*), that plaintiff and defendant, Castleman, at the time of the alleged trespass were tenants in common of this corn. For any trespass commiited thereon on the twenty-third day of October, 1884, both parties would have been required to join in the action.

III. It would follow, ordinarily, from the foregoing conclusion that one joint tenant could not maintain trespass against the other for taking the joint property, as the possession of one such tenant is the possession of all. And had the defendant, Castleman, obtained his possession of the premises and the crop peaceably, this action could not lie, for the conversion of the whole estate an action of trover might lie. *McCoy v. Hyatt*, 80 Mo. 130.

But the defendant, Castleman, by his action before

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the justice of the peace, and sending the constable armed with colorable process to regain the possession of the premises, recognized the fact, even viewing the letting as for the farming season, that the plaintiff was holding the premises, and as he had a reasonable time after the season was out to gather his crop and make the division, while the plaintiff had the right to enter for the purpose of gathering and dividing, he had no right to regain such possession by force or violence. The ancient common law right of entry and distress without process does not exist in this state. *Crocker v. Mann*, 3 Mo. 472. And where he resorts to force he becomes a trespasser *ab initio*; "and the action is maintainable for all damages resulting from the tort to the real estate, and from the removal of the common property." *Daniels v. Brown*, 34 N. H. 459.

The method resorted to by Castleman was illegal. The process with which he and his co-defendants armed the constable was unlawful. It was by false color of his office, and the apparent authority attaching to it, that the plaintiff was forced to yield the possession. Once in the defendant, regardless of the joint interest of the plaintiff, took and appropriated the whole. Under such circumstances I think defendants are to be regarded as trespassers *ab initio*, and for all damages immediately resulting therefrom in the appropriation of the common property they must be held.

IV. But the court erred in authorizing, by its instruction, the jury to find for plaintiff the full value of the corn. The plaintiff was only entitled to recover his share, with interest from the date of conversion. *Daniels v. Brown*, *supra*.

The judgment of the circuit court is reversed and the cause remanded. All concur.

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SOLOMON MUSSER, Appellant, v. J. F. HARWOOD ET AL., Respondents.

Kansas City Court of Appeals, December 6, 1886.

1. PRACTICE — APPELLATE COURTS — POWERS OF TO RENDER FINAL JUDGMENT.—The appellate courts of this state have the power, and have always exercised it, to determine a case before them finally, by simply *reversing* the judgment of the lower court. So a judgment of *affirmance* by said courts is a determination that the judgment of the lower court is right, and remains in full force, and is entitled to be enforced.

2. ——— ENFORCING JUDGMENT.—The general rule is that every judicial tribunal having jurisdiction to pronounce judgment, has authority to award execution, and exceptions to this rule must rest upon some clear and positive statutory limitations. There are no such exceptions as to the appellate courts of this state.

APPEAL from Clinton Circuit Court, HON. GEORGE W. DUNN, Judge.

Reversed and remanded.

Statement of case by the court.

The plaintiff in this suit was the defendant in the case of *Robinson v. Musser*, reported in 78 Mo. 153. In that case the plaintiff therein, in accordance with the order of the circuit court to that effect, gave a bond, in the usual form, with the defendants in the present case as sureties, to secure the payment of all costs that might be adjudged against the plaintiff in that said case. Robinson had judgment in the circuit court and Musser appealed therefrom to the supreme court. In the latter court, as shown by the reported opinion of the court, it was held that the plaintiff had no case, and the judgment of the circuit court was simply reversed.

Upon the opinion of the supreme court thus delivered, the following judgment was entered in said court:

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"Now at this day again come the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Ray county circuit court rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of said judgment. It is further considered and adjudged by the court that the said appellant recover against the said respondent his costs and charges herein expended and have therefor execution."

Afterwards this action was instituted, upon the bond given for security for the costs in the original case, againsts these defendants who were sureties on said bond, for the recovery of the costs paid by this plaintiff, which had been taxed in both the circuit and the supreme courts. The court below held that, by the judgment of the supreme court, the costs taxed in that court only had been adjudged against the plaintiff in the original case, and that the defendants here were liable as such sureties for those costs only. From a judgment accordingly entered the plaintiff has appealed to this court.

WILLIAM HENRY, for the appellant.

I. In construing judgments and other records, the whole record must be looked to and taken together. Freeman on Judgments [3 Ed.] sects. 45, 54.

II. The judgment of the supreme court in the case of *Robinson v. Musser*, was a final judgment, and was against Robinson for all costs therein. And to ascertain its effect, if doubtful, it should be construed with reference to the nature of the case to which it relates. See *Case*, 78 Mo. 153; *Hunt v. Hopkins*, 83 Mo. 13. To construe the judgment of that court so as to adjudge against Robinson the costs of appeal only, is to give to such judgment the effect of leaving unadjudged all the costs in the case which had accrued in the lower court, and to

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impute to that court the most flagrant disregard of a plain statutory duty. Sect. 900, Rev. Stat.

III. The judgment is a *final one*—is for all costs in the case—and is proper and in accordance with a good and wholesome practice, and is justified by our practice act. Sects. 3672, 3776, 3779, Rev. Stat.; Nash's Plead. and Pract. [Rev. Ed.] 689, 690.

J. F. HARWOOD and RAMEY & BROWN, for the respondents.

I. The obligation sued on will be strictly construed, and if there is no judgment against plaintiff for the defendants' costs in the circuit court, the judgment of the lower court must be affirmed. *Nofsinger v. Hartnett*, 84 Mo. 549.

II. The judgment of the supreme court in the case of *Robinson v. Musser*, is only for the costs of that court. *Evans v. Wilder*, 5 Mo. 313. The judgment only annuls the judgment of the circuit court; it does not purport to adjudicate the rights of the parties. *Laith v. McDonald*, 7 Kan. 234; 2 Bouvier's Law Dict. 589, Title, "Reverse."

III. The question has already been adjudicated in case of the motion in the supreme court to tax the costs in the case of *Robinson v. Musser*. That court, upon said motion, refused to tax, or in any way ascertain the costs expended in the circuit court by plaintiff.

HALL, J.—It is true that the "jurisdiction of the supreme court "is defined and limited by the constitution" of this state, and that such jurisdiction is appellate only, with certain well known exceptions, such as cases of *habeas corpus*, *mandamus*, *quo warranto*, *prohibition*, etc. *Vail v. Dinning*, 44 Mo. 211. But under our practice act (sect. 3776, Rev. Stat.) it is the duty of the supreme court, in appeals or writs of error, to "award a new trial, reverse or affirm the judgment or decision of

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the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law." The same or similar provisions have been in force ever since the foundation of the state, and existed even prior thereto, under the territorial government. *Meyer v. Campbell*, 12 Mo. 607. The supreme court and the two courts of appeals have always exercised the power conferred by said provisions, and have rendered in appropriate cases such judgments as they have determined the circuit court should have rendered. *Darrier v. Darrier*, 58 Mo. 222; *Durkel v. Chambers*, 57 Mo. 576; *Bell v. Railroad*, 86 Mo. 612 (on re-hearing); *Speak v. Dry Goods Co.*, 22 Mo. App. 122. It is too late at this day to question the constitutionality of said provisions.

The supreme court had the power to reverse the judgment of the circuit court, and to render final judgment in favor of the defendant in the case of *Robinson v. Musser;* it had the power to reverse such judgment and dismiss the petition in such case. *Gatewood v. Hart*, 58 Mo. 261; *Jenkins v. McCoy*, 50 Mo. 348; *McGee v. Laramore*, 50 Mo. 425.

A reversal of the judgment and dismissal of the petition by the supreme court would have been a final determination of the case. Did the simple reversal of the judgment, without remanding the case, have the same effect? Both modes have been indiscriminately used by all the appellate courts of this state in finally determining cases. In the cases last cited the judgments were reversed and the petitions dismissed.

But in other cases to accomplish the same end the judgments have been simply reversed and the cases not remanded. In *Bell v. Railroad* (*supra*), the court held that the plaintiff had made no case and that the defendant ought to have had judgment in the circuit court, and finally disposed of and determined the case by simply reversing the judgment. In *Walden v. Dudley* (49 Mo. 422), the court held likewise, and simply reversed the judgment. And in *Speak v. Dry Goods Co.* (*supra*), the

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St. Louis court of appeals, by Thompson, J., said: "The judgment will be reversed. The plaintiff has had his day in court, has failed to make out a case or to offer any evidence in contradiction of the evidence of defendant, which is clear, consistent, and entirely probable, and which shows that plaintiff has no case. It does not, therefore, appear that the ends of justice will be served by remanding the cause. The judgment will be reversed merely. It is so ordered." We quote the above language as so clearly showing the practice in this state in this respect. It would be an endless and fruitless task to discover and cite all the cases in our reports, in which cases have been finally determined by our appellate courts by simply reversing the judgment. We are clearly of the opinion that the supreme court, by ordering simply the reversal of the judgment in the case under discussion, intended to, and did, finally determine it, as said court had the full power so to do.

The judgment actually entered was a final judgment upon the merits, and was a complete bar to another suit on the same cause of action by the plaintiff, Robinson. The judgment of a simple reversal was entered in accordance with the opinion of the court, and, as has been said, it was intended to and did have the effect stated.

By section 990, Revised Statutes, it is provided: "In all civil actions or proceedings of any kind the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law." Had the judgment which was entered by the clerk of the supreme court wholly followed the opinion and order of that court, it would have adjudged against the plaintiff, Robinson, all the costs expended by the defendant, Musser, taxed in the circuit court as well as those taxed in the supreme court. And we think that the judgment entered did, in fact, do so. The words "his costs * * * herein expended," used in the judgment, in our opinion, mean the costs expended in the

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case, and not those only expended in the supreme court. "Herein" refers to the case, and not to the court.

The case of *Evans v. Wilder* (5 Mo. 313), cited by counsel for the defendants, is not an authority against our construction of the judgment. The meaning of that case is made more clear by the subsequent case of *Meyer v. Campbell* (12 Mo. 607). A reading of the two cases together will show that in the former the point decided by us was not in the mind of the court or alluded to in the case.

Under our practice act, as construed in actual practice since the formation of the state, a judgment by the supreme court, affirming the judgment of the circuit court, "is not a distinct and independent judgment of recovery, which may be enforced by execution, but purely a determination on the part of that court that the judgment of the circuit court is right, and that it should, therefore, remain in full force, and that the party holding it should no longer be restrained from enforcing it by execution." The supreme court might, "no doubt, if it were desirable, * * * enter a judgment of recovery, at the same time that a judgment of affirmance is given, and if it did so * * * no execution could then issue upon the judgment of the circuit court, although an execution might issue upon the judgment of the supreme court, either from the clerk's office of that court, or of the circuit court." *Meyer v. Campbell, supra.*

In *Evans v. Wilder* (*supra*), the judgment rendered by the supreme court was a judgment simply affirming the judgment of the circuit court, a judgment of recovery was not superadded, and it was, therefore, held that an execution issued on such judgment from the clerk's office of the supreme court was good only for the costs made in that court. As to everything but the costs of the supreme court, the judgment of that court was a judgment that the circuit court proceed to execute its own judgment, which was pronounced to be valid and accordir to law, and in full force.

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That determination or decision of the supreme court having been duly certified to the circuit court, was to be carried into effect by an execution upon the judgment so declared to be affirmed. *Meyer v. Campbell*, *supra*.

Hence an execution could issue from the clerk's office of the supreme court only for the costs of that court. And in such a case the practice has continued from the time of *Evans v. Wilder*, of an execution being issued from the clerk's office of the supreme court for the costs of that court.

Such was all that was decided by *Evans v. Wilder*. It was not intimated that the supreme court did not have the power to itself enforce by execution any judgment which it might render as its own distinct and independent judgment.

On the contrary, it is provided by section 3779, Revised Statutes, that: "The supreme court, upon the determination of any cause in appeal or error, may award execution to carry the same into effect, or may remit the record, with their decision thereon, to the court from whence the cause came, and such determination shall be carried into execution by such court." These provisions, of equal age with the other provisions of our practice act already noticed, were considered and construed by the supreme court in *Meyer v. Campbell* (*supra*). And it was held that, where the judgment of the circuit court is first reversed and a judgment is then awarded by the supreme court in favor of the party for whom the circuit court had rendered judgment, an execution may issue upon such judgment from the supreme court, or upon the certified transcript of such judgment the circuit court may issue execution.

So we hold as to any distinct and independent judgment rendered by the supreme court. The general rule is "that every judicial tribunal having jurisdiction to pronounce judgment has authority to award execution." Freeman on Execution, sect. 10. "Exceptions to this rule must rest upon some clear and positive statutory

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limitation." *Id.* The provisions of the statute last quoted make no such exception, but rather support the general rule.

When the record with the court's decision thereon is remitted by the supreme court to the circuit court, the clerk of the latter court has the power to issue an execution to enforce the judgment rendered by the supreme court without an order made by the circuit court directing him so to do. *Wilburn's Adm'r v. Hall*, 17 Mo. 414. The argument to the contrary by counsel for the defendants is not well made. It would seem that the clerk of the supreme court might issue an execution which the clerk of the circuit court has the power to issue.

A judgment, of course, must be certain and definite, but it need not name the amount of the costs. The taxation of the costs of the supreme court by its clerk is sufficiently certain and definite, and so, too, is the taxation of the costs of the circuit court by its clerk.

The judgment entered in the supreme court in the original case was, as to the costs, sufficiently certain and definite; the costs taxed by the circuit court and supreme court clerks were the costs adjudged against the plaintiff in said case.

Had an execution been desired from the office of the clerk of the supreme court, a certified bill of the costs of the circuit court could have been readily furnished the clerk of the supreme court.

Otherwise, upon the record with the decision of the supreme court thereon having been remitted to the circuit court, an execution could have been issued by the clerk of the circuit court for all the costs in the case, for those of the supreme court as well as those of the circuit court. Our attention has been called to a motion made by Musser in the supreme court, at the October term thereof, 1883, to tax in the original case the costs made in the circuit court, and to an order made by the supreme court denying said motion.

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Waiving the fact that said motion and the order denying it do not appear in the record of this case, and are made to appear to us by a certified copy thereof being attached to the briefs filed by counsel for the defendants, we hold that they neither constituted a former judgment as to the matter in issue in this case, nor a controlling authority upon us as a decision by the supreme court in relation to the said matter as against the views expressed herein. And for the very plain reason that if our views are correct the motion was properly denied. The motion was simply endorsed as "denied," no reasons were given for denying it. We are inclined to the belief, that the motion was denied on account of the reasons expressed in this opinion.

The circuit court should have rendered judgment in favor of the plaintiff for the costs of the circuit court paid by him which had been duly taxed.

The judgment is reversed and the cause is remanded for new trial in accordance with this opinion. All concur.

M. D. LEWIS, ADMINISTRATOR, ETC., OF WILLIAM F. ROGERS, Plaintiff in Error, v. H. WEST, ADMINISTRATOR, ETC., OF THOMAS J. ROGERS, Defendant in Error.

Kansas City Court of Appeals, December 6, 1886.

VENDOR AND VENDEE—COVENANTS OF WARRANTY—CONSIDERATION—CASE ADJUDGED.—It is a settled rule that a vendee of land, who has received a deed with covenants of warranty, *and who has been let into possession*, cannot, when sued at law on the notes given for the purchase money, set up the defence of a want or failure of consideration, without showing an actual eviction. But that rule does not apply to a case (such as this is) in which the deed conveys an *unknown*, *uncertain* and *undetermined interest in the land*, and

where the failure of consideration is total it may be set up to defeat recovery upon the note.

ERROR to Cass Circuit Court, HON. NOAH M. GIVAN, Judge.

Affirmed.

Statement of case by the court.

This was an action by the plaintiff, as administrator of the estate of Wm. F. Rogers, against the defendant, as administrator of the estate of Thos. J. Rogers, on a promissory note executed by Thos. J. Rogers and payable to William F. Rogers. This proceeding was instituted in the probate court, where the plaintiff had judgment, from which the defendant appealed to the circuit court.

William F. Rogers and Thos. J. Rogers were brothers, sons of Willis C. Rogers, who died in Kentucky, seized and possessed of certain real estate, leaving a will. By his will it was provided that all of his real estate be sold and the proceeds thereof be distributed in the manner provided by the will. As to his son, William F. Rogers, it was provided as follows:

"To my son, William F. Rogers, I will and bequeath out of the proceeds of said sale the sum of one dollar, it being his full share of my estate, both real and personal."

The father, Willis C. Rogers, died February 6, 1883. On March 13, 1883, Thos. J. Rogers executed the note in suit in consideration of William F. Rogers executing a deed, the granting clause of which, omitting formal parts, is as follows: "I, William F. Rogers, * * * do hereby grant, bargain and sell and convey to the said Thomas J. Rogers, his heirs and assigns forever, all and singular my right, title and interest, in and to a certain undivided tract of land, situate * * *, and of which said tract of land the late Willis C. Rogers died seized, and bounded as follows: * * *, and all the estate,

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title and interest of the said William F. Rogers, either in law or in equity of, in and to the said premises * * *."

The said deed contained the following covenant, "And the said William F. Rogers, for himself and for his heirs, executors and adminstrators, does hereby covenant with the said Thomas J. Rogers, his heirs and assigns, that he is the true and lawful owner of the said premises, and has full power to convey the land. That the title so conveyed is clear, free and unincumbered, and, further, that he will warrant and defend the same against all claim or claims of all persons whomsoever."

William F. Rogers died in September, 1883; and Thomas J. Rogers died a few days after his brother died.

That the note and deed were executed in consideration of each other was made to appear by oral testimony. It was also shown by such testimony that William F. Rogers intended to convey and that Thos. J. Rogers intended to buy the interest which William F. Rogers would have had as an heir in his father's estate, if it had not been for the will made by his father. The defendant introduced oral testimony tending to prove that, at the time of the execution of the deed and note, it was understood and agreed between the parties that, as a condition precedent to any liability on the part of Thomas J. Rogers on account of said note, William F. Rogers would set aside the will of the said Willis C. Rogers, and place Thomas J. Rogers in possession of the land mentioned in the deed. To the introduction of all which evidence the plaintiff objected.

For the defendant the court, who tried the case without the intervention of a jury, gave the following declarations of law:

"1. If the court shall believe and find from the evidence that the note sued upon was executed by Thomas Rogers to William F. Rogers for the purchase price of real estate described in the deed read in evidence

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from said William Rogers, and that the said William Rogers was not the owner of real estate nor any interest therein, then there was no consideration for said note, and the finding should be for the defendant."

"2. If the court shall believe and find from the evidence that said William Rogers was son of Willis C. Rogers, deceased, and that prior to the execution of the note sued on said Willis C. Rogers had made a will by the terms and provisions of which he bequeathed to said William F. Rogers the sum of one dollar only, and the said William F. Rogers undertook and promised the said Thomas J. Rogers to have said will set aside, and put said Thomas J. Rogers in peaceable possession of such interest in or property belonging to the estate of said testator as he, the said William F. Rogers, would have been entitled to if said will were set aside, and that said note was executed for such interest, on the faith and promise aforesaid, that said will would be set aside and said Thomas J. put in possession of said property; and if the court further believe and find from the evidence that said William F. Rogers failed to have said will set aside and put said Thomas J. Rogers in possession of such interest or property, then the consideration for said note has failed, and the finding should be for the defendant."

The court found for the defendant and the plaintiff has appealed.

C. W. SLOAN, for the plaintiff in error.

I. The court should have sustained the demurrer of plaintiff to defendant's evidence, there being no legal or competent evidence which constituted a defence.

II. The court erred in admitting parol testimony to vary and contradict the terms of the note sued on, or to show that the same was only to be paid conditionally. *Jones v. Jeffries*, 17 Mo. 577; *Smith's Adm'r v. Thomas*, 29 Mo. 307; *Benson's Adm'r v. Harrison*, 39 Mo 393;

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Bunce, Adm'r, v. Beck, Ex'r, 43 Mo. 266; *Ely v. Kilborn*, 5 Denio (N. Y.) 514.

III. The court erred in admitting the evidence of J. P. Rogers as to declarations made by William F. Rogers, long subsequent to the execution of the note, there being no consideration for the promise then made. Cases cited *supra; Wharton v. Foundry Co.*, 1 Mo. App. 577; *Pearson v. Carson*, 69 Mo. 550; *Henning v. Ins. Co.*, 47 Mo. 431.

IV. The court erred in giving instructions asked by defendant, and refusing instructions asked by plaintiff—no fraud or misrepresentation in procuring the note being shown by the evidence. Sect. 547, Rev. Stat.; *Crow v. Harmon*, 25 Mo. 417; *Carr v. Card*, 34 Mo. 573; *Williams v. Jensen*, 75 Mo. 681; *Armstrong v. Winfrey*, 61 Mo. 354.

V. There was sufficient consideration for the execution of the note. See cases last cited. The evidence tended to show defendant was in possession of land at his death. *Conner v. Eddy*, 25 Mo. 75; *Mitchell v. McMullen*, 59 Mo. 252; *Cartwright v. Culver*, 74 Mo. 179; *Hunt v. Marsh*, 80 Mo. 398.

VI. There being no evidence of fraud or misrepresentation, and possession having been given, and no ouster or eviction shown, there was no failure of consideration. Cases last cited; *Wheeler v. Shandly*, 50 Mo. 509.

VII. The court erred in admitting evidence of the deed and will and of witnesses and depositions, because no defence was shown. And so as to appointment of administrator in Kentucky and of *committee*. And so in admitting hearsay evidence as to how the possession of the land was obtained.

WOOLDRIDGE & DANIEL, for the defendant in error.

I. The defence is a failure of consideration. In an action between the original parties the consideration may be inquired into. *Klein v. Keyes*, 17 Mo. 326;

Sect. 3725, Rev. Stat.; *Williams v. Mellon*, 56 Mo. 262; *Boogher v. Knapp*, 76 Mo. 455; *Murphy v. Gay*, 37 Mo. 535.

II. There was no error in giving instructions asked by defendant. It was based on the theory that the consideration for the note had failed, and all the evidence offered by the defence sustained the instruction. So there was no error in refusing plaintiff's, based on fraud, for we neither have or do claim note was obtained by fraud.

III. There was no error in admitting testimony. It is all competent and strongly tends to support the defence herein made.

HALL, J.—The contract between William F. Rogers and Thomas J. Rogers was executed by the delivery of the deed by the former to the latter. In the absence of fraud, and there was a total absence of fraud in this case, the terms of the contract were to be explained and governed by the terms of the deed into which the former had merged, and the purchaser's only right for relief depended upon the covenants for title which he had received. Rawle on Con. for Title, 459. The terms of the written contract could not be added to or varied by oral testimony. *Pearson v. Carson*, 69 Mo. 551, and cases cited; *Ely v. Kilborn*, 5 Denio, 515.

Had the deed conveyed by quit-claim the grantor's right, title and interest in the land, in the absence of fraud on the part of the grantor, the total want of title in the grantor would not have constituted a want of consideration for the note. The execution of the deed would have been a sufficient consideration. *Carter v. Harber*, 18 Mo. 207. Nor would it have been competent for the grantee or his representative to have shown, in an action on the note, that the contract contained a warranty of the grantor's right, title and interest, or that it contained any terms or conditions other than those named in the deed.

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The words of the granting clause of the deed, conveying the grantor's right, title and interest in and to the land, were only effectual to convey that which the grantor had the lawful right to convey. *Farrar v. Patton*, 20 Mo. 83. But what was the effect of the covenant of warranty contained in the deed? It would seem, perhaps, that the warranty, though general in its terms and broader than the terms of the grant, should be held to be co-extensive with the grant, rather than to extend the grant. *Bogy v. Shoab*, 13 Mo. 380. To so hold is in the interest of the plaintiff.

Holding the warranty to have such effect only, we find that by the deed the grantor did not quit-claim his right, title and interest in and to the land, but that he conveyed such right, title and interest warranting that he had *some* right, title and interest to convey.

And if, in fact, the grantor had no right, title or interest to convey, the deed conveyed nothing; there was a total failure of consideration, and the note was *nudum pactum*.

It is a settled rule that a vendee of land who has received a deed with covenants of warranty, and who *has been let into possession*, cannot, when sued at law on the notes given for the purchase money, set up the defence of a want or failure of consideration, without showing an actual eviction. *Hunt v. Marsh*, 80 Mo. 398, and cases cited.

In this case, under the construction which we have made of the deed, the grantor did not undertake to convey the fee-simple title to the land, but he simply undertook to convey the right, title and interest had by him. That right, title and interest were claimed to be the share of an heir in the land left by the grantor's father. The father left numerous heirs, and had the will been invalid, the grantor would have had only an undivided interest in the land, and such interest did he claim. The grantor could not have put the grantee in possession of said interest until the land had been partitioned or

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divided among the heirs according to law, and such partition could not have taken place until the will had been set aside. The rule to which we have referred can have no application to this case. That rule does not apply to a case in which the deed conveys *an unknown, uncertain and undetermined interest in the land.* But to such a case would seem to apply the principle, on which is based the rule, that the covenants of seizin are broken as soon as made when the land conveyed is in possession of a stranger, at the date of the deed, under a paramount title, and substantial damages are recoverable by the grantee. *Cockrell v. Proctor*, 65 Mo. 46.

Inasmuch as the grantor warranted that he had some right, title and interest in the land to convey; inasmuch as it was impossible for the grantor to place the grantee in possession of the only interest claimed by the grantor in the land, until the will had been set aside, it does not appear how any harm could have been done to the plaintiff by the second declaration of law given for the defendant. This is true because the parol undertaking and promise on the part of the grantor, referred to in the said declaration of law, were in effect contained in the written warranty. By taking a warranty the grantee showed conclusively that he bought an interest in the land and not a law suit. The law suit was the grantor's. Until placed in possession of some interest had in the land, unless, indeed, the grantor had an interest therein which the grantee could have lawfully taken possession of, the grantee did not have to pay any part of the purchase price of the land.

And no harm was done to the plaintiff by said declaration of law for another reason. Under the will the grantor in the deed had no right, title or interest whatever in the land. The will not having been set aside was binding in this case. There was a total want of consideration, therefore, because the grantor had no right, title or interest which he could convey, and the judgment must have been for the defendant.

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It follows from what we have said that it was proper for the defendant to prove by oral testimony that the note in suit was executed in consideration of the execution of the deed by William F. Rogers, and that said Rogers had no right, title or interest described in said deed; that no harm was done to the plaintiff by the introduction of the evidence, objected to by him, to prove certain facts not material to the real issue, because it clearly appeared from competent proof that there was a total want of consideration for said note; and that the judgment was for the right party.

The judgment is affirmed. All concur.

WILLIAM W. MARBOURG, Respondent, v. J. V. BRINKMAN ET AL., Appellants.

Kansas City Court of Appeals, December 6, 1886.

BILLS OF EXCHANGE—PRESENTMENT FOR PAYMENT—WHERE DRAWN BY BANKERS—CASE ADJUDGED.—A distinction has been taken between cases where bills of exchange, or drafts, are drawn by bankers and others, as a mode of making profit, and exchanging them for money; and cases where such bills are drawn by private persons having no such reference to profits. In the *former* case the banker is understood to sanction the circulation and non-presentment by his course of business. But in the *latter* case the presentment ought to be within a short period. *Held*, that the rule as to bankers, above indicated, is applicable to the facts of this case.

APPEAL from Jackson Circuit Court, HON. F. M. BLACK, Judge.

Affirmed.

The case is stated in the opinion.

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LATHROP & SMITH, for the appellant:

I. The draft in suit is a bank check and not a bill of exchange. 2 Daniel on Negotiable Instruments, sect. 1566; *Bank v. Coates*, 3 McCrary, 9; *Veazie Bank v. Winn*, 40 Maine, 60.

II. The holder of a check should present it for payment within a reasonable time, and if the drawer sustained any loss or injury from the want of such presentment he will be discharged. 2 Daniel on Negotiable Instruments, sects. 1592, 4, 5; *St. John v. Homans*, 8 Mo. 382; *Chouteau v. Rouse*, 56 Mo. 65; *Purcell v. Alemong*, 22 Gratt. (Va.) 739; *Hoyt v. Seeley*, 18 Conn. 353. What is a reasonable time is a question of law, the facts being undisputed. *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; *Gough v. Staats*, 13 Wend. 549.

III. A check is intended for payment and not for circulation. *Down v. Halling*, 4 B. & C. 692; *Rickford v. Rige*, 2 Camp. 537.

GAGE, LADD & SMALL, for the respondents.

I. The law excuses the delay at St. Joseph resulting from the death of Mr. Beattie. *White v. Stoddard*, 11 Gray (Mass.) 258; *Aymar v. Beery*, 7 Cowen (N. Y.) 705; Story on Bills (2 Ed.) sects. 234, 308 and 327; 1 Parsons on Notes & Bills (2 Ed.) 444; 2 Daniel on Negotiable Instruments (3 Ed.), sect. 1125, *et seq*.

II. The draft was presented for payment within a *reasonable time*. This is all the law requires, provided the paper is kept in circulation; and what is reasonable time depends on circumstances, including the usage of the country, in the light of which all the parties to the paper are presumed to have contracted. *Montelius v. Charles*, 76 Ill. 303; *School District v. Commonwealth*, 84 Pa. St. 464; *Nichols v. Blackmore*, 27 Texas, 586; *Fugitt v. Nelson*, 44 Mo. 295; *Linville v. Welch*, 29 Mo. 203; *Salisbury v. Renick*, 44 Mo. 554; *Robinson v. Ames*, 20 Johnson (N. Y.) 147; Story on Bills (2 Ed.)

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sect. 231; 2 Edwards on Bills (3 Ed.) sect. 702; 1 Parsons on Notes & Bills (2 Ed.) 267; 1 Daniel on Negotiable Instruments (3 Ed.) sects. 466, 472; *Prescott Bk. v. Caverly*, 7 Gray (Mass.) 217.

HALL, J.—This was an action by the plaintiff, who was the payee, upon a draft or check drawn by the defendants who were bankers at Great Bend, Kansas, upon the Mastin Bank of Kansas City, Missouri, their correspondent at the last named place. The draft was in the usual form and had been purchased of the defendants for the plaintiff by his agent. The defence was laches in the presentment of the draft to the drawee for payment.

The sole question presented for our determination is, was the duty as to the presentment of the draft the same as that made by law in cases of ordinary bank checks, or was said duty the same as that in cases of bills of exchange payable on demand? The court tried the case on the theory that the duty as to presentment was that existing in the latter class of cases.

The draft in this case was clearly a bank check and not a bill of exchange. 2 Daniel on Negotiable Instruments, sect. 1566; *Bank v. Coates*, 3 McCrary, 9. Had the instrument in suit been a bill of exchange drawn by the defendant on the Mastin Bank, payable on demand, it would according to the latter authority (*supra*) have been a bank check; and according to the authority first cited it would have been closely assimilated to a bank check. Vol. 1, sect. 605.

In speaking of the presentment for payment of inland bills of exchange payable on demand, it is said by Story: "A distinction has been taken between cases, where such bills are drawn by bankers and others, as a mode of making profit and a source of livelihood, by exchanging them for ready money, and cases where such bills are drawn by private persons, having no such reference to profits or means of livelihood, but merely for

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their own accommodation, or that of the payee. In the former case it has been said, that the banker or other person is understood to sanction both the circulation and non-presentment by his course of business, and by the advantages of credit, which he thus obtains from such circulation and non-presentment of the bill; and, therefore, it is difficult to say what length of time, consistent with the free circulation of the bill, would be deemed unreasonable, in not presenting the bill to the drawee for payment. But, in the latter case, the presentment ought to be within a very short period, and, perhaps, ought to be limited to such a period, as would be reasonable, supposing the bill had not been put in circulation.

The distinction here alluded to may seem nice, but it turns upon the supposed intention and understanding of the parties, derived either from their own particular acts, or from the common course of business. And, certainly, upon the question of what is reasonable diligence, or not, in the presentment of a bill, the situation of the parties, the course of their business and the mode of negotiation, are not unfit to be considered, in determining as between themselves (whatever may be the case as to third persons), what may properly be deemed, according to their understanding, a reasonable time for presentment; for, if they should expressly agree, that the bill might be kept in circulation for an indefinite time, there would be no doubt that the drawer would be bound to pay the bill, notwithstanding there had been no presentment for payment thereof to the drawee until after a considerable lapse of time, and he had, in the intermediate time failed in business, and become insolvent. And, if such an express agreement would be a waiver of what would otherwise be deemed laches on the part of the payee or holder, an agreement of a like nature might be implied from the surrounding circumstances, with equal cogency and propriety." Story on Bills, sects. 472, 473.

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The principle upon which this distinction is based would seem to apply with full force to a draft drawn by a bank upon another and distant bank, intended by the course of business to be circulated and not to be presented at once for payment.

And for this reason, it must be, that the courts have applied the rule governing the presentment of bills of exchange payable on demand to drafts drawn on distant banks, and that such decisions have been cited with approval in the leading text books on negotiable instruments. 1 Daniel on Negotiable Instruments, sect. 472; 2 Edwards on Bills, etc. (3 Ed.) sect. 762; *Banking Co. v. National Bank of Erie*, 63 Pa. St. 404; *Fugitt v. Nelson*, 44 Mo. 295; *Bull v. National Bank*, 14 Fed. Rep. 612. It is a part of the business and commercial history of the country that the various banks sell, for what is known as exchange, drafts upon their correspondent banks at distant business centers, which are intended to circulate as bills of exchange payable on demand circulate. That this is the fact, and that such is the usual business course of banks in the locality of the defendant's bank with relation to their correspondents at Kansas City, was abundantly shown by the evidence.

We hold that as to the *drawers* of the draft such presentment for payment only was required of the payee and the subsequent holders as is required in the case of a bill of exchange, payable on demand, under like circumstances. The court tried the case in accordance with this view of the law.

Judgment affirmed. All concur.

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JOHN SOLDANELS, Respondent, v. THE MISSOURI PACIFIC RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, December 6, 1886.

1. **NEGLIGENCE—HIRING OF MINOR—RULE CONCERNING.—The general rule of law is that a person hires a minor at his peril. It is his duty to ascertain the legal *status* of the child, and if he neglects to do so, the fault, as well as the consequences, is his own. Wood on Master and Servant, sect. 14.**

2. **——— PARENT AND CHILD—WHAT CONSTITUTES EMANCIPATION. The consent of a parent that his minor child may work and receive pay for himself, is but a license, revocable at will, as between him and the child. It is only when the implied emancipation has been acted upon by some third party, dealing with the child in good faith, that the parent will be estopped to assert his customary right against such third person. Schouler Dom. Rel., sect. 267.**

3. **PRACTICE—INSTRUCTIONS—COMMON ERROR.—A party cannot complain of error in instructions which he adopted in his own.**

APPEAL from Cass Circuit Court, HON. NOAH M. GIVAN, Judge.

Affirmed.

Statement of case by the court.

This is an action by the parent, John Soldanels, to recover damages for the loss of the services of his minor child, consequent upon injuries sustained while in the employ of the defendant, a railroad corporation, in switching trains in its yard at Pleasant Hill.

The substantive allegations of the petition are, that Joseph M., a minor son of plaintiff, aged about sixteen years, was employed by the defendant in the dangerous and hazardous work of coupling and uncoupling cars in its said yards in the night time. It is alleged that this employment of said minor was made by defendant against the express wishes of plaintiff, made known to

defendant prior thereto; that the boy was not qualified for the performance of such hazardous duty so as to properly protect himself; that on the eighteenth day of October, 1883, while attempting to make a coupling of two freight cars in said yard his right hand was caught between the draw heads, and so injured as to necessitate the amputation of the thumb and some fingers, permanently disabling him in the use of said hand.

The answer, after tendering the general issue, alleged that plaintiff's said son had been in defendant's employ as brakeman on its road for a long period of the time anterior to this accident, and was familiar with such work, and that any injury he may have sustained, at the time in question, was attributable to his own want of care, or that of his fellow servants.

The plaintiff's evidence tended to show that his son was employed, on or about the first day of October, 1883, in the work of coupling and uncoupling cars in the defendant's yard at Pleasant Hill; that this employment was made by one Martin in charge of said yards for defendant, with power to so employ and discharge such hands. The evidence also tended to show that some time prior to this employment the plaintiff had told the said Martin he did not wish his son to work on the said railroad, and that he wished him to attend school; that it was from one to three months prior to the injury he told Martin not "to hire him."

The injury occurred on the eighteenth day of October, 1883. The testimony tended to show that about ten o'clock of that night the boy went between two freight cars and attempted to make a coupling. Owing to the hole in the first draw head being worn too large the pin was obstructed so that it did not go through, and on the second attempt, the car colliding with another car standing out of its customary place on the track, the pin failed to get through, and the boy's hand was caught and lacerated. The boy did not discover this defect of

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the hole in the draw head until he made the effort to insert the pin the first time.

The defendant's evidence tended to show that this boy, in 1882, had run on one of defendant's trains as "a peanut boy," and in 1883 had been in defendant's employ as brakeman on one of its branch roads, but had been discharged by the agent of defendant, having charge of such matters, on the ground that he was a minor. This was prior to the time of plaintiff's notice to Martin. The boy boarded during all this time with his father, who kept a hotel in Pleasant Hill, and received his own wages. The evidence does not show, however, that he received any pay between the first day of October, 1883, when employed by Martin, and the day of the accident in question.

The plaintiff testified that he did not know his son was working on the railroad, that he supposed he was attending school at the time of the injury, while defendant's testimony disclosed circumstances which might reasonably have warranted the jury in finding that the plaintiff, at least prior to the last employment of his son, knew he was working on defendant's road.

The jury returned a verdict in favor of plaintiff, assessing his damages at $450. Defendant prosecutes this appeal.

THOMAS J. PORTIS and ADAMS & BOWLES, for the appellant.

I. The plaintiff's testimony shows that he had practically emancipated his son. And it is not true that plaintiff told defendant's agent that his son was ignorant of the dangers of the service. The son was an experienced railroad man and familiar with such duties.

II. The right to recover is bottomed on the alleged wrongful act of defendant in hiring the plaintiff's minor son and imposing hazardous duties upon him. The case, as made by the pleadings and proof, is based upon the theory that the simple fact of hiring the son and putting

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him to work at a place and business in which his father did not wish him to labor, was, of itself, such negligence of defendant as would entitle plaintiff to a verdict. But the son was guilty of gross negligence, after he had discovered the defect in the draw head, and the court should have so declared, as matter of law (there being no conflict in the evidence), and sustained defendant's demurrer to the evidence.

III. The court erred in giving instructions for the plaintiff, and in refusing instructions asked for defendant. Defendant's demurrer to the evidence and motion in arrest should have been sustained. *Railroad v. Miller*, 51 Texas, 374; *Curran v. Merch. Co.*, 130 Mass. 374; *Railroad v. Harney*, 28 Ind. 28; *Gaitland v. Railroad*, 67 Ill. 498.

A. COMINGO, with WHITSETT & JARROTT, for the respondent.

I. The instructions as a whole, and interpreted by the light of the record, are a correct exposition of the law of the case, and defendant's motion for a new trial and in arrest were properly overruled. And plaintiff's and defendant's instructions, relating to the measure of damages, are consistent with each other, and are correct. *McGonigle v. Dougherty*, 71 Mo. 265; *Davis v. Brown*, 67 Mo. 313; *Smith v. Calligan*, 74 Mo. 389; *Noble v. Blount*, 77 Mo. 241. Defendant's instructions, which were refused, are not warranted by anything appearing from the record, and were properly refused. *Bank v. Murdock*, 62 Mo. 73; *Fulkerson v. Thornton*, 68 Mo. 469.

II. Defendant cannot shield itself from liability on the ground of contributory negligence of the son. Furthermore, the jury found that he was not chargeable with that character of negligence. Even if he had, his negligence could not be imputed to plaintiff, who had not consented to his employment by defendant. *Fort v. Railroad*, 2 Dillon, 259. The Texas cases do not apply to the case at bar.

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III. The cases cited by defendant support, or are in harmony with, the foregoing propositions.

Philips, P. J.—I. Defendant insists that its demurrer to the evidence should have been sustained. We hold otherwise.

The answer, in effect, admits the employment by defendant of the plaintiff's son. The evidence is uncontradicted that he was a minor at the time. Martin, who made the contract of employment, must have known of this fact. The boy had only a short time prior to this last employment been discharged from defendant's service because he was a minor. Plaintiff had notified Martin of his wish that the boy should not go on the railroad, that he wished him to go to school. Martin, having charge of the railroad yard, with power to employ and discharge employes therein, is to be regarded, in this action, as a vice principal. *Moore v. Railroad*, 85 Mo. 588. Martin was not even put on the witness stand to contradict any of these statements.

The general rule of law is, that a person hires a minor at his peril. "It is his duty to ascertain the legal status of the child, and if he neglects to do so, the fault, as well as the consequence, is his own." Wood on Master and Servant, section 14.

The plaintiff's evidence, if credited by the jury, was that he did not know his son was at work in the yard at the time of the accident, that he supposed he was attending school. And even if he had known for the short period, or a part of it, intervening between the first and eighteenth days of October, that the boy was at work there, in view of plaintiff's express wishes, made known to the very agent who employed the boy, we discover no affirmative act of the plaintiff which would create any estoppel against his right to maintain an action for any loss, recognized by the law, resulting from this contumacious act of the agent of defendant. Nor can we accede to the proposition insisted on by

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counsel, that plaintiff had practically emancipated his son, and, therefore, as the action is to be viewed practically, as one *per quod servitium amisit*, the plaintiff ought not to recover.

Waiving any discussion as to whether the facts and circumstances in evidence touching the employment of the minor on the railroad prior to October, 1883, justified the inference of an implied emancipation, we can discover no proper foundation for such position at the time of the employment in question.

The consent of a parent that his minor child may work and receive pay for himself or herself is but a license, an indulgence from the parent, revocable at will by the parent as between him and the child. It is only where the implied emancipation has been acted upon by some third party dealing with the child, in good faith, that the parent will be estopped to assert his customary right against such third person. Schouler Dom. Rel., sect. 267; *Everett v. Sherpy*, 1 Iowa, 356.

Knowing as Martin did the father's wishes, in connection with the fact that the boy had been discharged from defendant's employ on account of his minority, he had no right to rely upon an implied emancipation predicated upon anterior occurrences. He took the boy at his peril, and the legal effect of defendant's conduct is little distinguishable, on principle, from that of one who harbors knowingly an absconding child. Taking the minor under such circumstances, and putting him to a hazardous work, the defendant should be held, in favor of the non-assenting parent, to the strictest accountability for all the consequences, resulting in loss of the services of the minor to the parent, following directly from such employment. The plaintiff could have recovered the value of the service of the boy from defendant, although it had previously paid the boy under its contract with him. Wood Master and Servant, sect. 14.

It should logically follow that when, as a result of such hazardous employment against the known wishes

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of the father, he is deprived of the permanent, or partial, services of his child during the remainder of his minority, he ought to be compensated therefor by the wrongdoer. In such action I much question whether the want of due care and judgment on the part of the minor, such as would preclude him from recovering for the personal injury, should apply against the parent.

The parent's loss would not have occurred but for the wrong of defendant in putting the boy, against his express wish, to such dangerous service. The case of *Frost v. Union Pacific Railroad* (2 Dillon, 258), gives strong color to this suggestion. It did not appear in that case, as it does in this, that the minor was taken into defendant's employ against the wish of the parent. Yet, inasmuch as the minor was put upon extra hazardous work by defendant's agent, it was held to take the case out of the operation of the rule that exempts the employer from liability to one servant for the negligence of a fellow servant in the same common service.

The defendant in the case at bar, however, had, under the instructions of the court, the full benefit of the proposition that the plaintiff could not recover if the minor in making the coupling was guilty of contributory negligence; and, further, that he took upon himself the risks incident to his employment.

II. If there was any departure, as suggested by appellant, in the instructions of the court, from the issues tendered in the pleadings, the defendant adopted the error in its instructions asked and given, and had the benefit of a questionable proposition of law.

Taken as a whole the instructions are not so inconsistent as to constitute reversible error. They quite favorably presented the law for defendant. The amount of the verdict is not unreasonable.

The judgment of the circuit court is affirmed. All concur.

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William McMurdock, Respondent, v. William H. Kimberlin, Appellant.

Kansas City Court of Appeals, December 6, 1886.

1. Practice—Continuance—Order Granting Not Complained of in Motion for New Trial.—Where an order granting a continuance in a cause is not complained of as error in the motion for new trial, the objection to the granting of it cannot be considered in this court.

2. ——— Verdict—Impeachment of by Jurors.—It is a well settled rule in this state that the *affidavit* of *jurors* will not be received to impeach their own verdict. Yet such juror's oath is admissible in *support* of his finding.

3. ——— ——— Paper Found in Jury Room—Whether Cause for Setting Aside Verdict.—A paper found in a jury room, after the jury have left it, upon which twelve different sums, of various amounts, are set down and added together, and the amount divided by *twelve*, the quotient being the precise sum for which the verdic was rendered, does not furnish sufficient ground for setting aside the verdict. It cannot be concluded *from this alone*, that each and all of the jurors did not agree to the verdict rendered. In a case for unliquidated damages *the jury* may well adopt the average judgment of them all, as the individual verdict of each.

4. ——— Instruction—Degree of Skill Required by Law from Physicians — Case Adjudged. — In a suit for malpractice, for alleged unskillfulness in the treatment of plaintiff's eye by the defendant, the court, by an instruction, *first* required the jury to find whether the defendant held himself out as possessing a degree of skill and diligence in the treatment of the human eye as high as that possessed by other good good surgeons of the specialty to which defendant belonged, and *if* they so found, and, further, that he did *not* exercise the skill that would ordinarily be exercised by good and careful surgeons, etc., they would find for the plaintiff. *Held*, that the instruction was proper under the evidence in this case.

Appeal from Jackson Circuit Court, Hon. James H. Slover, Judge.

Affirmed.

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The case is stated in the opinion.

W. C. STEWART, for the appellant.

I. The motion for a continuance ought not to have been sustained, and defendant compelled, when ready for trial, to submit to a continuance or to admit the *affidavit* in evidence. 31 Mo. 462; 28 Mo. 341.

II. The court erred in instructing as to the measure of damages, and is in contradiction of instruction given by the court at request of defendant.

III. The court erred in modifying instructions asked by defendant as to the degree of care, skill and diligence which the law required of defendant to bring to the discharge of his undertaking. The instruction, *as asked*, declared the law. *Small v. Howard*, 128 Mass. 131; *McCandless v. Mc Wha*, 23 Pa. St. 261; *Leighton v. Sargeant*, 7 Foster [27 N. H.] 460; *Howard v. Grant*, 23 Me. 97; *Simons v. Henry*, 39 Me. 7, 155; *Landon v. Humphrey*, 9 Conn. 209; *Utley v. Burnes*, 70 Ill. 162. So as to other instructions fairly stating the responsibility of defendant as implied by the law. Reasonable skill constitutes the measure of the engagement. *Patterson v. Gaudasaqui*, 15 East. 62; *Howard v. Grane*, 15 Shep. 97; *Teft v. Wilcox*, 6 Kan. 61.

IV. The court erred in permitting plaintiff to introduce incompetent evidence, in assuming a certain state of facts by a hypothetical question and allowing the witness to say, in his opinion, whether the treatment was proper and skillful. The *merits* of the issue must always be left to the jury. Starkie on Evid. [9 Ed.] 154; Elwell on Malpractice, 277; *Teft v. Wilcox*, *supra*.

V. The court erred in *rejecting* evidence offered by defendant, and in refusing to permit defendant to examine plaintiff's eye before the jury, and show therein, by his witness on the stand, the physical facts on which he gave his opinion, and afterward allowing plaintiff to do substantially the same thing through an expert witness.

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VI. The court erred in sustaining the verdict of the jury. It was, in law, no verdict at all, as is shown by the *affidavits* of the deputy sheriff, and by seven of the jury.

VII. The court should have granted a new trial.

John W. Beebe and F. W. Randolph, for the respondent.

I. The granting of continuance was a matter for the sound discretion of the trial court. *Scogin v. Hudspeth*, 3 Mo. 123; *Carpenter v. Myers*, 32 Mo. 213; *The State v. Klinger*, 43 Mo. 127; *Leabo v. Goode*, 67 Mo. 126.

II. The instructions given declared the law properly. The obligation is no more than that physicians will use reasonable care in the treatment of their patients. 2 Chitty on Cont. (11 Am. Ed.) 808; Smith on Negligence, 339; Whart. on Neg., sect. 730. The instructions given for defendant are more favorable than he deserved.

III. A hypothetical question may assume a great variety of forms. They are not objectionable, if within the possible or probable range of the evidence. *Hunt v. Gas Co.*, 8 Allen [Mass.] 169; *Harnett v. Garvey*, 66 N. Y. 641; *Fairchild v. Bascomb*, 35 Vt. 415; *Brown v. Chenorth*, 31 Tex. 439; *Leopold v. Vankirk*, 29 Wis. 548; *Gottlieb v. Hartman*, 3 Col. 58. In any event the objection to the question is too general, and the reviewing court will not consider it. *Clark v. Conway*, 33 Mo. 438; *Matthews v. Lecompte*, 24 Mo. 545.

IV. The affidavit of jurors will not be received to impeach their verdict. Thomp. & M. on Juries, 315; *The State v. Branstetter*, 65 Mo. 149; *The State v. Alexander*, 66 Mo. 148; *The State v. Underwood*, 57 Mo. 40; *Pratt v. Coffman*, 33 Mo. 71; *The State v. Railroad*, 37 Mo. 240. Nor is the paper found in the jury room evidence of misconduct. *Leverett v. The State*, 3 Tex. App. 218; *Railroad v. Wythe*, 51 Ind. 566; *Wiley v. Belfast*, 61 Me. 569. The affidavit of jurors in support of verdict

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settled all question as to misconduct. Graham on New Trial, 103, 108.

V. The appeal is wholly without merit.

ELLISON, J.—This action is for malpractice.

The petition charges that defendant, holding himself out as a physician and surgeon, undertook to treat the plaintiff's eye, and that he so unskillfully, carelessly, and negligently treated it that plaintiff lost its use, incurring great expense and suffering much pain. The answer admitted defendant was a physician and surgeon, and that he treated plaintiff's eye, but denied the other allegations of the petition.

There was a verdict and judgment for plaintiff for $362.75, and defendant appeals.

Defendant complains here of the action of the trial court in granting a continuance, in giving plaintiff's instructions and refusing a portion of those offered by defendant, in the admission of certain testimony, and in refusing to set aside the verdict for misconduct of the jury.

Defendant does not include the testimony, or any portion of it, nor any statement of its import, in his abstract as presented to us. Some portions of the testimony are set out in his brief and argument, but not in the manner nor in the place required by the rules of this court.

I. The granting of the continuance is not complained of as error in the motion for new trial, and we cannot, therefore, consider the objection made.

In support of the charge of misconduct against the jury the affidavit of Henry Dougherty, deputy sheriff, together with that of several of the jurors, was introduced.

That of Dougherty states that immediately on the return of the verdict, he went to the jury room and found on a table in the room a paper containing the following, the quotient being the exact amount of the verdict rendered, viz.:

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	450.
	1.00
	1.00
	1.00
	500.
	500.
	500.
	400.
	500.
	500.
	500.
	500.
12)	4353
	$362.75

One juror deposes that the figures were his, and were made by him near the close of the deliberations of the jury. Others of the jury deposed: "That it is true that after deliberating on the verdict that should be rendered a considerable space of time, and failing to agree, it was suggested by one of the jurymen that each member of the said panel of jurymen put down or declare a sum or amount which he thought the plaintiff should recover against the defendant, provided that no one should put down a figure above five hundred dollars ($500), and that the amounts so declared by the jurymen respectively should be added together, and the sum should be divided by twelve (12); and that the quotient should be the verdict of the jury. That said suggestion was agreed to by all the jurymen respectively, and that in pursuance of said agreement each one did declare a sum, which was marked down on paper, added together and divided as aforesaid; and, that without further vote or agreement, the said quotient or amount so found, to-wit, $362.75, was by said jury returned as their verdict in said cause,

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although some one of the jury made the remark: 'So say you all,' which created some merriment; but no vote for or against was expressed, after said amounts were added, and their sum divided by twelve, as above stated."

On the other hand, two of the jurors deposed, "That the method adopted of addition and division was to ascertain the individual views of the jurors, in the first instance; and, that after the result of such method was attained, the jury considered the amount as a proposition and agreed to it individually and collectively, and adopted the same as their proper verdict."

It is a well settled rule in this state that the affidavit of jurors will not be received to impeach their own verdict. *The State v. Fox*, 79 Mo. 109; *The State v. Branstetter*, 65 Mo. 149; *The State v. Dunn*, 80 Mo. 681. In *Pratte v. Coffman* (33 Mo. 71), it is stated that exceptions might be engrafted on this rule in felonies, and it is then said there was no good reason why the affidavit of a juror might not be received in aid of evidence derived from other sources. I consider the remarks of the court in that case as disapproved by later opinions of the same court. Each of the cases cited above were felonies involving "life and liberty," and that of *The State v. Branstetter*, was evidently intended to especially discountenance the statement referred to in *Pratte v. Coffman*. If this rule, so forcibly stated and illustrated in *The State v. Fox* (*supra*), is correct in principle, I am unable to comprehend how the innovation attempted in *Pratte v. Coffman*, can be received. How much and what character of evidence from outside would be necessary as a foundation for "explaining and enlarging" by testimony from inside the jury room, would be a question not easy to determine.

No consideration will, therefore, be given to the affidavits of the jurors in this case which tend to impeach the verdict.

It is insisted, however, that the evidence of the

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deputy sheriff is such as to nullify the verdict. He simply testifies to finding the paper above set out containing, in the hand of one of the jurors, the figures given. Conceding the figures on this paper to have been the act of the jury during their deliberation, I am of the opinion it is not inconsistent with the finding of a proper verdict in a proper way.

In a case for unliquidated damage the jury may well adopt the average judgment of them all as the individual verdict of each. Not that they can agree beforehand, without a knowledge of what the result will be, that such result, to be obtained by the average process, shall, irrevocably, be their verdict; this would be in the nature of a chance verdict, and would not have received the individual sanction of each member of the panel. The latter mode has met the disapproval of the supreme court in *Sawyer v. Railroad* (37 Mo. 241). But after having seen the result of the average, they may well adopt it. Where unliquidated sums are in controversy, it is rare indeed that a verdict could be obtained except by the compromise of opinion. The great object of a jury considering a case together is that they may learn each other's views, some, or even all, surrendering opinions and adopting others. This paper, then, without more, is not sufficient to affect the verdict. This precise question arose in Maine in the case of *Wiley v. Inhabitants of Belfast* (61 Me. 569), where it was held that "a paper found in a jury room after the jury have left it, upon which twelve different sums, ranging from nothing to several thousand dollars, are set down and added together, and the amount divided by twelve, the quotient being the precise sum for which the verdict was rendered, does not furnish sufficient cause for setting aside the verdict. It cannot be concluded from this alone that each and all of the jurors did not agree to the verdict rendered."

Notwithstanding the evidence of a juror will not be received to impeach his verdict, the return he has made into court estopping him from saying aught to the con-

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trary, yet such juror's oath is admissible in support of his finding. This arises, in part, from the necessity of the case. Were the rule otherwise, the work of a jury would be at the mercy of those of easy conscience, who might wish, from a variety of selfish motives, to thwart justice. *The State v. Underwood*, 57 Mo. 40; *Downer v. Baxter*, 30 Vt. 467; *Dana v. Tucker*, 4 Johns. 487; *Anderson v. The State*, 14 Ga. 709.

In this case we have the affidavit of two jurors, who state that the method adopted was to ascertain the individual views of the jurors, and that *after* the result was announced the jury *considered* the amount and agreed to it as their proper verdict. This mode of arriving at a conclusion is not new in cases of this nature, and has before this received the sanction of the courts. *Railroad v. Myrtle*, 51 Ind. 566; *Forbes v. Howard*, 4 R. I. 364.

II. Objections are made to the instructions given by the court. To that for plaintiff in regard to the measure of damages for the reason that it permitted damages to be assessed which may have been sustained by reason of the "unskillfulness," carelessness or negligence of defendant, when the plaintiff had not charged that defendant was not a skillful oculist.

Unskillfulness, as used in this instruction, does not refer to the knowledge or ignorance of defendant as an oculist, but as to the manner in which he may have treated this particular case.

The court, of its own motion, gave the following instruction:

"The plaintiff in this case sues the defendant as a physician and oculist, for unprofessional treatment of his eye as an oculist; and the defendant admits that he did treat the plaintiff for a diseased condition of the eye. Now, if you find, from the evidence, that the defendant did, at the time the plaintiff applied to him for such treatment, hold himself out to the public as a specialist in the treatment of the eye, and possessing a degree of skill and diligence in the treatment of the human eye

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as high as that possessed by other good surgeons of the specialty to which defendant belongs; and you further find, from the evidence, that the defendant did treat the plaintiff and operate upon his eye, as shown by the evidence, and in so treating plaintiff and operating on his eye, the defendant failed and neglected to exercise such a degree of care, skill and diligence as would ordinarily be exercised and exhibited by good and careful surgeons and oculists when treating and operating in a case similar to that now under investigation; and you further find that by reason of such failure and neglect of defendant, if there was any, the plaintiff was damaged, then you will find for the plaintiff, and assess his damages at such a sum as you may believe, from the whole evidence, he has sustained, not exceeding the amount claimed in the petition. If, on the other hand, you find, from the evidence, that the defendant, as such specialist or oculist, as above stated, undertook to, and did, treat and operate upon the plaintiff's eye, as shown by the evidence, and in so doing did exercise and exhibit such a degree of care, skill and diligence as would ordinarily be exercised and exhibited by good and careful surgeons and oculists when treating and operating in a case similar to the one on trial, then your verdict will be for the defendant."

It is claimed by defendant that this instruction sets up a higher degree of care and skill than is justified by the law. It would perhaps be a sufficient reply to this to say that it only requires defendant shall be held to that degree of skill which he held himself out as possessing. For it will be noticed that the court first requires the jury to find the defendant held himself out as "possessing a degree of skill and diligence in the treatment of the human eye as high as that possessed by other good surgeons of the specialty to which defendant belonged."

And if they so found, and further, that he did *not* exercise the skill that would ordinarily be exercised by good and careful surgeons, etc., they would find for the

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plaintiff. The instruction was proper, under the evidence in this cause. Wharton on Negligence, sect. 730.

There are many other points of objection to the action of the trial court which have been much elaborated by defendant, and which we have examined, but we perceive no error "materially affecting the merits of the action," and we affirm the judgment. All concur.

ALEXANDER DENNIS, Respondent, v. HENRY C. CROOKS, Appellant.

Kansas City Court of Appeals, December 7, 1886.

PRACTICE—CONFLICT OF EVIDENCE—QUESTION OF FACT.—Where the questions at issue were as to what the contract was; and as to whether plaintiff had violated it; and there was a conflict of evidence as to both of these questions, the court submitted them to the *jury*. *Held*, proper, and that the court thereby submitted simply a *question of fact* to the jury.

APPEAL from Grundy Circuit Court, HON. G. D. BURGESS, Judge.

Reversed and remanded.

Statement of case by the court.

This action was begun before a justice of the peace. The statement or petition was in two counts.

The first count alleged a verbal contract between plaintiff and defendant, by the terms of which plaintiff was to cut down and clear off the brush and timber from a certain tract of land owned by defendant, and to make the same ready for cultivation; and that plaintiff was to have for his services all the timber and wood said land would yield; that the plaintiff had cleared said land

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"except that there was about twenty dollars worth of timber remaining on said land not yet removed, which still remains there and which belongs to plaintiff;" that the defendant forbade and prevented the plaintiff and still prevents him from removing said timber from the said land to the plaintiff's damage in the sum of twenty dollars.

The second count was substantially the same as the first count, except that the contract was concerning a different tract of land, and the contract had not been so nearly completed as the contract set out in the first count. The damages were laid at one hundred and twenty-five dollars. From a judgment rendered by the justice of the peace an appeal was taken to the circuit court.

The case having been brought before a justice of the peace no answer was required. But the defendant made a verbal statement of his defence. It was thus stated that the defendant had contracted with the plaintiff for the clearing of the land, and that the plaintiff was to have the timber as payment for the work done by him; that the work was to be done in a certain manner, and if not so done that the plaintiff was to forfeit all further right under the contract and all further pay for the work done; that the plaintiff had not done the work in accordance with the contract; "that plaintiff had sold part of his claim on the timber under the contract to Thomas and William Cooksey, and that they, with plaintiff, had instituted a suit against the defendant therefor, prior to the commencement of this suit, in which suit all matters involved in this suit were embraced, litigated, and adjusted before the justice and appealed to the circuit court, where the same was still pending."

The plaintiff testified that he was made a party plaintiff with Thomas and William Cooksey in the suit referred to without his consent, and that by advice of counsel he withdrew from said suit. The statement

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filed in said suit, which was offered in evidence by the defendant but excluded by the court, stated that Thomas and William Cooksey had bought of the plaintiff in this case sixteen thousand feet of saw timber, of the value of eighty dollars upon the land of the defendant in this case, and that they had hauled away nine thousand feet of said timber with the consent of said defendant, leaving on his premises and in his possession seven thousand feet, of the value of thirty-five dollars, when he notified them not to remove any more of said timber to their damage in the sum of thirty-five dollars.

The plaintiff testified that he had sold to Thomas and William Cooksey sixteen thousand feet of saw timber to be removed from the land mentioned in the second count of the statement herein; that they had hauled nine thousand feet of said timber, leaving seven thousand feet of it on the said land where it still remained.

The plaintiff dismissed as to the first count of the statement.

The defendant introduced evidence tending to prove the defence verbally stated by him except in so far as concerned the former suit. Evidence offered by the defendant touching that part of the defence was excluded. The court for the plaintiff instructed the jury that if they found from the evidence that the contract was made as stated by the plaintiff, and "that the plaintiff was engaged in doing said work, about the last of January, 1885, defendant without any just cause, served notice on plaintiff to stop his cutting and hauling of logs on said land, and prevented plaintiff from completing his agreement, then the jury will find their verdict for plaintiff in the market value of all the timber, cut or uncut, then remaining upon said land, less such amount as from all the evidence the jury shall believe it was worth to complete the clearing up of said thirty acres, and burning the brush so as to make it ready for the plow."

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GEORGE HALL and A. G. KNIGHT, for the appellant.

I. Where the court tells the jury, in instructing for plaintiff, that "if defendant without *any just cause* served notice," etc., they will find for plaintiff, it submits a question of law to the jury. *Estes v. Fry*, 22 Mo. App. 53; *Speak v. Dry Goods Co.*, 22 Mo. App. 122; *Morgan v. Durfee*, 69 Mo. 469.

II. The court erred in the instruction, as to damages, and especially in the *first*, which was "*to find for plaintiff in the market value of all the timber cut and uncut then remaining on said land*," thereby telling the jury to allow plaintiff "the market value" of some timber already sold.

III. The court erred in refusing to permit defendant to show that all of plaintiff's claim against defendant had been settled and determined in a former suit. If such was the fact there could be no second recovery for the same cause of action. *Hickerson v. City of Mexico*, 58 Mo. 61; *Sweet v. Maupin*, 65 Mo. 65; *Ibid*, 47, 323; *Wood v. Ensel*, 63 Mo. 193. So as to refusal to permit defendant to introduce petition and other papers in said suit aforesaid. *Railroad v. Trobe*, 59 Mo. 355; *Mason v. Plankinton*, 64 Mo. 337; *Henry v. Wood*, 77 Mo. 299; *Railroad v. Levy*, 16 Mo. App. 500; *Haley v. Bosley*, 37 Mo. 364.

No brief for the respondent.

HALL, J.—Two objections are urged against the instruction, given for the plaintiff, which has been set out in the foregoing statement. First, because the court submitted a question of law to the jury by telling them to find for plaintiff if they found that the defendant without "*any just cause* served notice on plaintiff to stop cutting and hauling," etc. Second, because by telling the jury, if they found for plaintiff, to find "for plaintiff in the market value of *all the timber cut and uncut then remaining on said land*," the court in-

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structed the jury to find for plaintiff "the market value" of the timber which he had, according to his own statement, already sold to Thomas and William Cooksey.

The questions as to what the contract was, and as to whether the plaintiff had violated his contract were for the jury to pass upon. There was a conflict of evidence as to both of these questions. The court submitted no question of law by submitting to the jury the question whether or not the defendant "without just cause" gave the notice to plaintiff to stop, etc. The court thereby submitted simply a question of fact to the jury. The defendant only claimed the right to give said notice by virtue of the contract being as he stated it to be and of a violation of its terms by plaintiff in the manner of doing the work. The question of fact submitted was, was the contract as stated by defendant, and if so had the plaintiff violated the terms of said contract? The jury must have so understood the instruction from the language of the instruction itself; and this meaning was but made clearer, if possible, by the other instructions given in the case. The first objection does not seem to us to be tenable.

But the second objection is well made. The plaintiff had admitted to having sold a certain quantity of timber to the two Cooksey's, a portion of which he stated was still upon the land. It was, therefore, error to instruct the jury, if they found for the plaintiff, to find the value of that timber. This also applies to any timber then on the land which the plaintiff might have sold theretofore to Philip Robinson.

From a judgment rendered in the justice's court in the suit brought by the Cooksey's against this defendant to recover the value of the timber sold to them by plaintiff and then remaining on the land, an appeal had been taken to the circuit court. The judgment was not an estoppel as against the very parties to that suit, because the suit was for trial *de novo* in the circuit court.

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By a prosecution of the appeal the judgment was as if it had never been; it was final and binding upon no one. *Turner v. Northcutt*, 9 Mo. App. 251. And, of course, the pendency of that suit did not prevent the plaintiff from bringing this action. This was not a case of the assignment of a part of a cause of action or of the splitting of a cause of action. *Bank v. Noonan*, 14 Mo. App. 246. The plaintiff sold to the Cooksey's a part of his timber. They were the proper parties to sue for the value of that which they bought, if it was converted by the defendant; the plaintiff was the proper party to sue for the value of that which he kept. The court properly excluded all evidence touching the suit then pending in the circuit court, which the Cooksey's had brought.

For the error mentioned the judgment is reversed and the cause remanded. All concur.

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ANDREW MULLIN ET AL., Appellants, v. W. H. MARTIN, Respondent.

St. Louis Court of Appeals, December 7, 1886.

1. DEBTOR AND CREDITOR—CONTRACTS—COMPOSITION AGREEMENT.—A composition agreement between a debtor and his creditors does not, unless it is performed, as a general rule, discharge the debtor from the residue of the debt.

2. ——— Where notes are given by the debtor for deferred payments under a composition agreement, if taken by all the creditors in satisfaction of the indebtedness, their non-payment does not revive the residue.

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

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EDWARD A. ELLIOTT and G. BLAIR, for the appellants: An agreement to compromise and adjust an undisputed indebtedness by the acceptance of unsecured notes by the debtor for a less amount than that due, is void for want of consideration. *Line v. Nelson*, 33 N. J. L. 358; 6 Wait's Actions and Defences, 409; *Brook v. Moore*, 67 Barb. 394; *Curran v. Rummel*, 118 Mass. 482; *Harriman v. Harriman*, 12 Gray, 341. The acceptance of a note does not release a debt unless it is so stipulated in the agreement. *Putnam v. Lewis*, 8 Johns. 387. An arrangement between a debtor and his creditors, whereby they receive unsecured notes of the debtor in discharge of the amounts due them, is not binding upon them unless such notes are not paid. An accord and satisfaction does not exist in such case, and the original debts may be made the subject of actions. *Riley v. Kershaw*, 52 Mo. 224; *Tellon v. Ascott*, 16 Barb. 593; *Ennikin v. Stahl*, 9 Mo. App. 390; *Bank of Commerce v. Hoeber*, 11 Mo. App. 475; 2 Parsons on Contracts (5 Ed.), 684; *Goff v. Mulholland*, 28 Mo. 397; *Leabo v. Goode*, 67 Mo. 126; *Clark v. Densman*, 5 N. H. 136.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff sued on an open account for $415.25. The cause was heard by the court, without a jury, on the following agreed statement of facts:

"Plaintiffs are, and at the time hereinafter mentioned, were partners in trade, doing business in Chicago, Illinois, under the firm name of Mullen Brothers & Co. That defendant was legally indebted to them in the sum of four hundred and fifteen and forty-five hundredths dollars, for goods sold and delivered to him by plaintiffs, after deducting all credits and set-offs, on February 21, 1884. That on May 2, 1885, defendant, plaintiffs, and all other of the defendant's creditors, by valid agreement in writing to the following effect, agreed

that said creditors would accept forty per cent. of the amount of their respective debts, in notes of the defendant, payable in three, six, nine, and twelve months after date, in complete satisfaction of said original indebtedness, which the defendant should pay. That the defendant, in furtherance thereof, executed and delivered to the plaintiffs, and all other creditors, his certain promissory notes due three, six, nine, and twelve months after date, which said notes were dated May 19, 1885, and said notes on the part of the plaintiff, were accepted by the plaintiffs, and are herewith filed, marked 'Exhibit A,' 'Exhibit B,' 'Exhibit C,' 'Exhibit D,' respectively. That all the other creditors accepted similar notes under the terms of the said agreement. That the compromise notes given Mullen Brothers by the defendant, as aforesaid, have not been paid; that three of them have matured, and been duly presented to the defendant for payment, but the defendant has refused and failed to pay them, or any part thereof; that all of said notes, excepting the one maturing May 19, 1886, are now due and unpaid."

Upon the facts so stated, the court gave judgment for the defendant.

The plaintiff insists that he was entitled to recover on the proposition that a payment, either in cash or by note, of part of an undisputed debt will not discharge the indebtedness, even though the creditor accepts it as a satisfaction of the whole. The general rule to that effect has long been established, and stands mainly upon the ground of a want of consideration to bind the creditor. But it is subject to many exceptions, and never prevails where the creditor acts upon a consideration independent of the partial payment. One of these exceptions is, where the payment is received by way of composition with creditors. *Morris Canal v. Van Vorst*, 1 Zab. 119. It is needless to say that, according to the agreed statement, the present case is within that exception. The joining of the other creditors in the common

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arrangement, furnishes a sufficient consideration to each separate creditor, binding him to his absolute or conditional discharge of the debtor. The concurrent action of all the creditors increases the debtor's ability to pay what is stipulated for; whereas, without such concurrent action, any one creditor might lose his entire claim.

The plaintiff's learned counsel press upon our attention the rule that a note given for an existing indebtedness will not extinguish the original debt, unless the parties expressly agree that such shall be the effect. The rule is correctly stated. *Bertiaux v. Dillon*, 20 Mo. App. 603. But it is without influence in this case, because the agreed statement shows an express stipulation in the settlement, that the notes should be "in complete satisfaction of said original indebtedness."

It is further urged that the plaintiff may rescind the settlement and fall back on the original indebtedness, because the notes have not been paid. There is nothing in the agreement which will justify such a claim. The notes themselves contained the whole obligation to pay, upon which the parties relied, as appears by the language used in the agreed statement. In *Pupke v. Churchill* (16 Mo. App. 334), it was held that the debtor's failure to pay a note given in pursuance of a composition in bankruptcy entitled the creditor, at his option, to a release from the agreement for composition, and to a recovery on the original indebtedness. But, besides the fact that the composition was governed by the bankruptcy act, the agreement in that case contained a stipulation by the debtor, in these words: "Any failure on my part to pay the notes or the insurance premiums, according to the terms of this composition, shall, at the option of the creditor, work a release of his acceptance thereof." The decision enforced literally the terms of the agreement, and was undoubtedly correct. It is sustained by a large array of authorities cited in the opinion by Judge Thompson, all of which

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hold that, if the debtor fails to perform strictly any of his undertakings in the composition agreement, the creditors will be released from its obligations. We have re-examined those authorities and find, with the rule, that a debtor who gives notes in pursuance of a composition agreement must pay them according to their tenor, or forfeit all benefit of the composition, a constant qualification to this effect: "*Unless* it be expressly agreed that the notes are to be taken in satisfaction of the indebtedness." Compositions made under the general bankrupt law of 1874 were always attended by a necessity for actual payment of the notes given, because the statute itself required that the debtor's payments should be *in money*. Many of the decisions referred to above are based expressly on this ground; which ground, of course, does not appear in the present case. On the other hand, cases are not wanting in which it is adjudged that a note given will, on general principles, discharge an original indebtedness, whenever it is agreed to be taken by the creditor in full satisfaction of such indebtedness. *Sard v. Rhodes*, 1 Mees. & Wels. 152. In *Mackenzie v. Mackenzie* (16 Ves. Jr. 372), a bond creditor, who had joined in a composition, whereby the debtor gave notes secured in a manner satisfactory to the creditor, was restrained, notwithstanding a default in payment of the notes, from taking execution in an action on his bond, for an amount in excess of the composition notes. In *Hurst's case* (3 Cent. L. J. 78), a composition was made under the general bankrupt law. Emmons, J., held that the resolution for payments in notes must, in order to avoid a violation of the statute, be interpreted to mean payments in *money*. The notes, therefore, were not capable of performing satisfaction without actual payment. He uses, at the same time, this significant language: "In the construction which we give this resolution, holding as we do that it does not mean the delivery of the promissory notes as payment and a discharge of the debtor, we do not approbate the

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extreme expressions in several of the cases on this subject which hold that there must be an express agreement in terms to accept a note in satisfaction before it will operate as such. It is a mere matter of interpretation in each instance, controlled by the circumstances in which the agreement is made."

In this case, the language of the agreed statement so emphatically declares that the giving of the notes is to be "in complete satisfaction of the original indebtedness," that, to exact their actual payment besides as a necessary condition, would be to add a new term to the agreement. The parties did not intend the absurdity that, first, a certain event should operate a "complete satisfaction," and, secondly, that the same event should *not* operate a complete satisfaction, unless another event supervened. There may be a faint suggestion of ambiguity in the closing words: "Which defendant should pay." Does this refer to the payment of the notes? Evidently not. The expression "should pay" is here the equivalent of "ought to pay." It is simply a descriptive tautology applied to the term "original indebtedness," with which it is in immediate juxtaposition, bridged only by the relative "which," as referring to the same term next before uttered. It is as if it were said: "The notes for forty per cent. shall be in satisfaction of the whole indebtedness which the defendant *ought to pay;* but which he will, by the terms of this agreement, be excused from paying." If the parties had intended that the notes should be paid at maturity, or else the agreement would be void, they would naturally have said so in unambiguous terms.

The defendant's answer purports to set out the agreement, word for word, as it was signed by all of the creditors. The words therein used, after describing the notes to be given, are: "Each of us to accept said notes in full settlement and payment of our said accounts, upon the delivery of said notes aforesaid." This would be conclusive of the meaning of the parties; if it were

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admissible to accept the pleading of a party as evidence of a fact therein stated in his own favor. While we will not assume that the answer contains a true copy of the agreement, as it avers, we yet find some grounds for a strong moral persuasion in that direction. The answer was filed on April 5, and the agreed statement on April 19. No reply, or denial of the answer, was filed at any time. Had the plaintiff found the agreement untruly stated in the answer, it is reasonable to suppose that he would have replied with a denial. The rule requires a reply to be filed within three days after the time for filing the answer; and, if this is not done, it results that all new allegations in the answer will be taken as admitted by the plaintiff to be true. It thus occurs in this case, that there were at least eleven days during which the record bore upon its face a practical admission by the plaintiff that the agreement was truly set forth in the answer. All the pleadings, however, and all legitimate inferences from them, were superseded by the agreed statement. So that, if a disagreement existed between the pleading and the statement, the latter would, of course, prevail. But we are not here discussing any question of disagreement between those papers. The question is only one of interpretation of one of them. To what extent interpretation of the one may be aided by a reference to the other, we will not now undertake to decide. It is sufficient that the agreed statement shows a clear understanding between the parties, that the notes to be given by the defendant were to be taken in complete satisfaction of the original indebtedness, and, therefore, the plaintiff can not found any claim of recovery in this action, on the non-payment of the notes at maturity.

The judgment will, therefore, be affirmed. Rombauer, J., concurs; Thompson, J., dissents, and files a dissenting opinion.

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Dissenting opinion by THOMPSON, J.

I dissent from the opinion which has been delivered in this case. I agree with the conclusion of the court that it was competent for the parties to agree, if they were foolish enough to do so, to accept the debtor's promissory notes for a portion of their debts in discharge of the whole, and to release their debtor, whether he should thereafter pay the notes or not. But, as the general rule is, that a composition agreement means payment *in money*—that being what the debtor expects to give and what the creditors expect to get—I do not think that such an agreement should be construed as an agreement on the part of the creditors to discharge their debtor upon the receipt of certain pieces of paper representing but a fraction of their indebtedness, although such pieces of paper might turn out to be entirely worthless, unless such a conclusion is unavoidable from the language used. Looking at the composition agreement as stated in the agreed statement, upon which the parties submitted this case to the circuit court, I find it clear, beyond doubt, that the parties had no such intention. The agreed statement of facts recites, "That the creditors, by a valid agreement in writing, to the following effect, agreed that the said creditors would accept forty per cent. of the amount of their respective debts in notes of defendant, payable in three, six, nine, and twelve months after date, in complete satisfaction of said original indebtedness, which defendant should pay." The clause, "which defendant should pay," I take to be a clear and unequivocal statement that it was a part of the composition agreement that the defendant should pay the notes. It is a principle in the interpretation of written instruments that effect is to be given to every clause of the instrument if possible. But the court construes this instrument so as to give no effect whatever to the clause, "which defendant should pay," but so as to make it idle and tautological. The draftsmen

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of this agreed statement were legal practitioners in good standing; they were educated men; and I take it that they knew enough about the rules of English syntax, and about the principles which govern the interpretation of written instruments, to know that such a clause was not necessary for the purpose of describing the original indebtedness, and that, on settled principles of interpretation, it would be held to mean just what I hold it to mean.

But what I regard as a painful feature of this case is, that the court have really not decided it upon the agreed statement, but upon the answer. My brethren regard themselves, no doubt, as having decided it upon the agreed statement; undoubtedly, they are sincere in this; but I am entirely satisfied that if the discovery had not been made that the answer purports to set out the composition agreement *in haec verba*, and that the agreement as so set out is to the effect that the notes are accepted in satisfaction of the debt, and does not contain any clause making it obligatory on the defendant to pay them, this cause would have been decided the other way. It is a settled rule of procedure in this state, that where the parties go to trial on an answer which sets up an affirmative defence, the answer is to be treated as having been denied, although no denial has been filed. *Howell v. Reynolds County*, 51 Mo. 154; *Henslee v. Cannefax*, 49 Mo. 295; *Smith v. St. Joseph*, 45 Mo. 449. This is just what the parties have done in this case. They have gone to trial, not upon the answer —if they had intended to do that the plaintiff would have demurred, or would have moved for judgment on the pleading, or the parties would have agreed to submit the case to the court upon the allegations in the answer— but they have gone to trial on an agreed statement of facts which states the composition agreement differently from the way it is stated in the answer. The agreement as recited in the answer may for aught we know, be

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correct, and it may be incorrect. The plaintiff has never admitted its correctness, but it stands, under settled rules of procedure, as a denied and discredited pleading. We have no more right to look to it for the purpose of influencing our judgment upon the case than we would have to look to a piece of loose paper blowing about the streets; and I wish to enter a distinct protest against this method of administering justice.

I think that the judgment should be reversed and the cause remanded, with directions to enter a judgment in favor of the plaintiff upon the agreed statement.

23a	546
31a	372
31a	373
33a	34
33a	160
33a	456
23	546
104m	23
23	546
52	424
23	546
64	54

JOHN JOHNSON, Respondent, v. BARNES & MORRISON BUILDING COMPANY ET AL., Appellants.

St. Louis Court of Appeals, December 7, 1886.

1. **MECHANIC'S LIENS—SUB-CONTRACTOR—LIEN ACCOUNTS.—A lien is not vitiated because the account filed by a sub-contractor includes charges for work not included in the contract, but which would be a proper subject of lien if included in the contract, where the improper items are severable from the other parts of the account.**

2. **——— AGENCY—NOTICE OF LIEN.—A resident person, who is charged by a non-resident owner with the duty of approving all bills or demands prior to their payment, is the owner's agent, and service of notice of intention to file a lien is sufficient, under the statute.**

3. **APPELLATE PRACTICE—WEIGHT OF EVIDENCE.—An appellate court will not vacate a verdict, supported by substantial evidence, on the ground that the opposing evidence greatly preponderates.**

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

J. L. & F. P. BLAIR, for the appellants: (1) The

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account filed as the basis of the lien is defective; it is not a "just and true account," as required by the statute. Rev. Stat., sect. 3176; *Nelson v. Withrow*, 14 Mo. App. 270, 276, par. 2; *Edgar v. Salisbury*, 17 Mo. App. 271; *Kershaw v. Fitzpatrick*, 3 Mo. App. 575; *Murphy v. Murphy*, 22 Mo. App. 18; *Schulenburg v. Hawley*, 6 Mo. App. 34; *Kling v. Mo. Ry. Const. Co.*, 7 Mo. App. 410; Phillips on Mechanics' Liens, 352; *Lowis v. Cutter*, 6 Mo. App. 54; *Barker v. Berry*, 8 Mo. App. 446; *Heinrich v. Carondelet Society*, 8 Mo. App. 587; *Henry v. Rice*, 18 Mo. App. 510; *Schulenburg v. Prairie Home, etc.*, 65 Mo. 295; *Mc Williams v. Allen*, 45 Mo. 573–5, cited and approved; *Coe. v. Ritter*, 86 Mo. 277–87. (2) The service of the notice was defective, because it is not shown that the persons on whom it was served were the agents of the owners; the circuit court erred, therefore, in not excluding the notice from the jury. Rev. Stat., sect. 3190; Wharton on Agency, sect. 178; *Hayward v. Ins. Co.*, 52 Mo. 581; *Goodloe v. Godley*, 21 Miss. 233; *Bank v. Downing*, 16 N. H. 187; *Lionberger v. Mayer*, 12 Mo. App. 575; *Alexander v. Rollins*, 14 Mo. App. 109–117; *Gentry v. Ins. Co.*, 15 Mo. App. 215; *Anderson v. Volmer*, 83 Mo. 403; Story on Agency, sect. 140; *McCormick v. Wheeler*, 36 Ill. 114; *Bank v. Schaumberg*, 38 Mo. 228; *Ins. Co. v. Ins. Co.*, 10 Md. 517; *Henry v. Bunker*, 22 Mo. App. 650; *Towner v. Remick*, 19 Mo. 209.

TAYLOR & POLLARD, for the respondent: The provisions of the law are to be liberally construed to uphold the lien, and unfriendly strictness and mere technicality avoided. *Putnam v. Ross*, 46 Mo. 338; *Oster v. Rabeneary*, 46 Mo. 595; *Dewitt v. Smith*, 63 Mo. 263; *Hassett v. Rust*, 64 Mo. 325; *Morgan v. Railroad*, 76 Mo. 172; *Ransom v. Sheehan*, 78 Mo. 673; *Hayden v. Wulfing*, 19 Mo. App. 357. The authority of an agent is to be determined by the nature of his business, and is co-extensive with the requirements of such

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business. *Gentry v. Ins. Co.*, 15 Mo. App. 215; *Livermore v. Blood*, 40 Mo. 48; *Franklin v. Ins. Co.*, 52 Mo. 461; *Brooks v. Jameson*, 55 Mo. 512; *Edwards v. Thomas*, 66 Mo. 468; 2 Greenleaf on Evidence, sects. 60 and 61; Story on Agency, sects. 45 and 50; *Amory v. Kaunoffsky*, 117 Mass. 353.

Lewis, P. J., delivered the opinion of the court.

The plaintiff, as a sub-contractor for plastering, under the contract made between the defendant, Barnes & Morrison Building Co., as principal contractor, and the defendants, Fairman Rogers and Isaiah V. Williamson, as owners, for repairs and alterations done on the St. James Hotel, in the city of St. Louis, sues for three hundred and fifty dollars, the value of his work, and a mechanic's lien on the property. The verdict and the judgment were for the plaintiff.

The account filed with the lien is in the following terms:

"1882.		
"Dec. 29th.	To furnishing material and doing the work of plastering the south or party wall of the St. James Hotel, including patching of the ends of partitions and ceilings, and joining same in basement, 1st, 2nd, 3rd, 4th and 5th stories, viz: 757 14-100 yards of plastering at 43 8-10 cents	$331.52
	52 8-10 linear feet stucco cornice at 35 cents	18.48
		$350.00"

The defendants object that this account is fatally defective, and insufficient to sustain the lien. One point of objection is that it includes work done in the basement; whereas the testimony shows that such work was not provided for, either in the principal contract, or in

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the sub-contract. *Nelson v. Withrow* (14 Mo. App. 270); *Edgar v. Salisbury* (17 Mo. 271), and *Murphy v. Murphy* (22 Mo. App. 18), are relied on in support of this objection. In each of those cases a charge for work or services on account of which the law gives no lien, was so mixed in and blended with other items upon which a lien might be based, that it could not be perceived from the account what proportion was chargeable for each. The owner of the property, therefore, could not know what amount of payment would release it from the lien. In the present case, the objectionable item is not one from which the law would withhold a mechanic's lien, if properly charged. It can not be intended by the law that the entire lien must fail, if the mechanic should not make satisfactory proof of an insignificant item in his account. The reason of the rule in *Nelson v. Withrow*, fails, if the unproved item be one upon which a lien might attach. The owner of the property may litigate or not, as he pleases, as to that item, and is at least fully informed, on the face of the paper, what amount will discharge the lien, as lawfully claimed by the mechanic. All this assumes, of course, that the item is separable from the other items which are properly proved. This court said, in *Kershaw v. Fitzpatrick* (3 Mo. App. 575), "Where an objectionable item can be separated from the other part of the account, the lien may stand." The basement work was separated by the proofs, in this case, and was accurately shown to have amounted to $4.66, which amount was withdrawn from the plaintiff's claim by an instruction, with the plaintiff's consent. That the separable nature of an objectionable item will save the lien as to the rest which are not open to objection, was long ago settled in *Edgar v. Salisbury* (17 Mo. 273). We can not consider the defendants' objection in this instance as competent to defeat the plaintiff's lien.

A similar objection is made to the item of stucco cornice. This item is separable from the others, on the

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face of the account. But it is not at all clear that the work so described was not a part of the plastering contemplated in the contracts. The testimony shows that the wall which was to be plastered had been removed two feet further south than where the old wall stood. The contract required that "all connecting divisions" should be plastered two coats, one of brown mortar and one white, "hard finished, all in the best manner." It is not assuming too much to say that cornice work is generally understood to be a part of the plasterer's business; and, if there was a cornice around the three other sides of the room, it is difficult to see how the connecting divisions could be completed "in the best manner" without extending the cornice, and perhaps carrying it along the fourth side. But, however this may be, in point of fact, the jury appear to have found, under the plaintiff's instruction, that all the work was done under the contract, excepting the basement work; and no attempt was made by the defendants to have the item of cornice work eliminated from the plaintiff's claim. They do not undertake even here to make their objection to this item available, except for the purpose of defeating the entire lien. This, as we have already shown, is not admissible, consistently with what we have above said in connection with the work in the basement.

The defendant owners are non-residents. The plaintiff's notice of lien was served on Charles T. Farrar and James L. Blair, as agents of the owners. Farrar was a real estate agent, having in charge the hotel property for the purpose of collecting rents and paying taxes and insurance. The character of Blair's agency is shown in the following extracts from the testimony.

1. Examination of Mr. Blair:

Q. "Did you examine any of the bills that were paid before they were paid? A. I did. I think I told you just now that was my business."

Q. "That it was your business to examine the bills? A. Yes, sir."

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Q. "Did you examine the bills of Barnes & Morrison? A. As I told you awhile ago, the bills were presented to me through Mr. McElfatrick, the supervising architect, from time to time—amounts, not bills. The contract was drawn so that payments should be made at certain times. Upon McElfatrick certifying that the time had arrived when such payments were due, each certificate was sent to me, as the attorney of these gentlemen, and I examined it and compared it with the terms of the contract."

Q. "Who were you the attorney of? A. Williamson and Rogers."

Q. "When did that kind of employment begin? when did you begin to supervise and look over the certificates issued by the architect? did that kind of employment begin at the institution of the improvement in the hotel? A. Yes, sir; I drew the contract."

Q. "Before any of the work was done? A. Yes, sir."

Q. "And before any payments were made or certified by the architect, you looked over the matter and approved it? A. Yes, sir; if it was correct I approved it."

Q. "The understanding was that you were to approve the bills before they were paid, was it not? A. Yes, sir."

Q. "Any certificate issued by the architect for work done upon that building necessarily passed through your hands before it was paid? A. Yes, sir."

2. Examination of Mr. McElfatrick, the architect and superintendent:

Q. "Did Mr. Blair represent to you that he was the attorney to see whether the building was completed or not? A. I think he did, sir."

Q. By Mr. Blair. "Was it not my duty, as far as I was concerned, to find how much money the contractors were entitled to under the contract? A. Yes, sir."

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Q. "That was all I had to do in the matter, was it not? A. Yes, sir; that is just what I tried to state."

Without undertaking to determine the sufficiency of Mr. Farrar's agency to validate the service of the notice upon him, let us inquire into the effect of the service upon Mr. Blair. The general rule is, that notice given to an agent while his agency exists, and coming within the scope of his authority, is notice to the principal. *Hayward v. Ins. Co.*, 52 Mo. 181. Vories J., elucidates this with the remark that, "Generally it is sufficient to notify an agent whose proper business is to attend to the matters in reference to which the notice is given." He also quotes from Story on Agency, section 140: "Upon a similar ground notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with the subject matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal." Now, the precise matter here, with reference to which the notice of the plaintiff's claim was given, was his demand of payment for work done under the contract. The question submitted by it was, whether the claim should be paid, or resisted? In other words, whether the demand should be legally contested, or should be approved and paid without a contest? This question was closely connected, or rather, identified with the subject matter of Mr. Blair's agency; since he was to "approve the bills before they were paid," and was to "find how much money the contractors were entitled to under the contract." It may be objected that, according to the testimony, Mr. Blair's agency was confined to the approval or disapproval of bills certified by McElfatrick and Son, the superintendents. True, his proceedings were usually limited to such certified bills, but his own statements show that his authority comprehended all bills for work done under the contract; and, as to this, there was no lack of privity between the

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plaintiff sub-contractor and the principal contracting parties, with their superintendents. The defendants contend that the superintendents were the only proper agents of the owners upon whom the notice of lien claim should have been served. But the superintendents had nothing to do but to look after the manner and quality of the work done, and to certify as to these facts. They had nothing to do with questions of payment, which were reserved for the decision of Mr. Blair. This gentleman's relations with the owners were, at least, such as should justify a presumption that, when the notice of the plaintiff's claim was served upon him, he, acting within the scope of his agency, "communicated the facts to his principals." The statute (Rev. Stat., sect. 3190) requires a sub-contractor to give notice "to the owner, owners, or agent, or either of them, that he holds a claim against such building or improvement," etc. We think that, as to the person served, this law was substantially complied with, if Mr. Blair's agency had not ceased at the time of the service. As to this condition, it is sufficient to say that nothing in the record indicates a cesser of his agency before all demands for work done under the contract were passed upon or settled. The verdict in this case shows that the plaintiff's claim was not in that category, at the time of the notice.

Counsel for the defendants maintain with much ability their proposition, that the preponderance of evidence in this record against the verdict and the instructions given, is such as to raise a presumption of gross prejudice or wilful disregard of the testimony, on the part of the jury, and so to call upon us for a reversal of the judgment on that ground alone. The point of this proposition lies in the testimony about the date upon which the plaintiff's last work was done. The lien was filed on April 27, 1883. So that, in order to a compliance with the statutory limit, the last work must have been done on or after December 27, 1882. Six several witnesses testified to facts which were inconsistent

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with the possibility that any work was done under the contract after August or September, 1882. The plaintiff, however, swore that he did plastering on the first story of the new south wall, under his sub-contract, on the twenty-ninth or thirtieth of December, 1882; that he was present every day of the last week in December and saw the work being done by his employes; that he took his tools away on New Year's Eve, and that he had been much delayed by the frequent necessity of suspending his work for the accommodation of the hotel keeper and his guests, as he was required to do, by the terms of his contract. Alfred Johnson testified that he worked for the plaintiff in finishing up the plastering during the Christmas week of 1882, and that the white coating of the new south wall on the first story was done as late as the twenty-ninth or thirtieth of December; that the tools were not taken away until New Year's Eve; a fact about which his memory was clear, because of the ending of his apprenticeship to the plaintiff on the same day. There were many points of direct conflict between the testimony of these two witnesses and that given by the others; and it may be remarked generally, that corroborations were the more frequent on the side of the defendants. But we do not feel authorized by this state of the record to assume that the jury were controlled by prejudice, or that they wholly disregarded the testimony before them. Nor do we find in it any sufficient ground for a departure from the ancient appellate dogma against passing upon the weight of evidence. The jury were the proper judges of the accuracy or the conscientiousness of the witnesses, and the judge before whom the cause was tried was better qualified than we can be, to say whether or not the jury performed their duty in a spirit of fairness and justice.

The defendants contend that the petition omits, contrary to (Rev. Stat., sect. 3179) certain statements of fact which were necessary for the securing of a lien. The petition states the original contract, and that the

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work done by the plaintiff was included in the same; but it is objected that there is no statement that the work was done under and by virtue of the original contract. We think that the fact required substantially appears in the allegation made, and that, if this were otherwise, the defect would be cured by the verdict. The same may be said of the alleged omission of a statement in the petition, that the notice described the premises to be affected by the lien. A fair interpretation of the language used does include such a statement. But, if this be questioned, there remains the fact that the notice itself was in evidence, and that it contains in full the proper description. The verdict would, therefore, cure the defect, if any existed.

We find in this record no good reason for disturbing the conclusions reached in the circuit court, and the judgment is, therefore, affirmed. All the judges concur.

WILLIAM KEATING, Respondent, v. JOHN A. HYDE, Appellant.

St. Louis Court of Appeals, December 7, 1886.

1. ELECTIONS.—The act of March 18, 1874, concerning elections was not repealed by section 1474, of the Revised Statutes, and though omitted from the revision of 1879, is still kept in force by section one of the schedule of the constitution of 1875.

2. ——— VOID AGREEMENTS.—A promise to pay for services rendered by another as a canvasser at a primary election to secure the promisor's nomination for an office, is unlawful and void.

APPEAL from the St. Louis Circuit Court, GEORGE W. LUBKE, Judge.

Affirmed.

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MARTIN, LAUGHLIN & KERN, for the appellant: The act of March 18, 1874, was omitted from the revision of 1879. Torny's Note to Rev. Stat. 51. And it was not kept specially in force by the scheme and charter, article 2, section 22, Revised Statutes, 1879, page 1581.

T. J. CORNELIUS, for the respondent: The act of 1874 never was repealed, and its omission from the Revised Statutes, 1879 is not a repeal by implication. Sedgwick Stat. and Const. Law, 127. *The State ex rel. v. Judge St. Louis Probate Court*, 38 Mo. 529; *Howard v. Clark*, 43 Mo. 345. "No implied promise to pay for services arises, when the contract is prohibited by law absolutely." Greenhood on Public Policy, 601; Session Acts 1874, 54, 55.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff sued before a justice of the peace, founding his complaint on the following order, payment whereof was refused by the drawee, on the ground that there was no money in his hands payable to the drawer:

"*I. H. Sturgeon, Collector First District of Missouri.*

"Please pay to William Keating, or order, the sum of fifty dollars, for value received, and deduct the same from my pay as deputy for the month of October, 1878, and this will be my receipt for same.

"Sept. 30, 1878. JOHN A. HYDE."

There was another order, for $12.50, included in the complaint, but the plaintiff dismissed as to that in the circuit court, and it cuts no figure in the case, as it now stands. An amended complaint was filed in the circuit court at the trial upon the defendant's appeal, to which amendment the defendant objected, on the ground that it introduced a new cause of action. The objection was properly overruled. The amended complaint merely

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amplified and made more intelligible the cause of action intended to be shown in the original complaint, except as to the $12.50 claim, which was differently described. As this part of the demand was abandoned by the plaintiff, no prejudice resulted to the defendant. It is not intended to be intimated, however, that the change of description, under the circumstances, presented a new cause of action. The defendant filed an answer in which he averred that the claims sued on had been fully paid and discharged, and set up a counter-claim of two hundred dollars, for "moneys had and received of the defendant."

The defendant introduced testimony tending to show that, in March, 1881, the plaintiff was a candidate for the office of president of the board of assessors in the city of St. Louis, and wished to be the nominee of the Democratic party. That he then said to the defendant, "The money that I gave you on your order I will call square, and I want you to work for my nomination." "I am a candidate and want you to work for my nomination. The money I gave you on the Sturgeon order, we will call it square, and if I am elected, I will give you a good position." The defendant further testified that he did work in good faith for the plaintiff's nomination, distributing the plaintiff's cards and announcements, and getting other persons to do the same, and buying drinks for the privilege of leaving such cards and announcements in public saloons, etc. That, after the plaintiff's failure to obtain the nomination, he told the defendant that he had torn up, or that he would tear up, the Sturgeon order.

The court gave for the plaintiff the following declaration of law:

"If, by the evidence, it appears, and the court finds, that plaintiff, after the maturity of the order in controversy, and whilst holding the same, became a candidate for the political office of assessor in the city of St. Louis; that to secure said office he promised and agreed with

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defendant, that if he, defendant, would work and canvass for plaintiff in obtaining the party nomination for said office, he, the plaintiff, would consider the said order paid, then such agreement was an illegal one, and any work done or money expended by defendant thereunder is not the subject of set-off or counter-claim, nor can such agreement be set up as a defence in this action."

And refused on the defendant's application, to give the following:

"If the plaintiff, in the year 1880 or 1881, was desirous of becoming a candidate for a political office, and he employed the defendant to make public his ambition, and in pursuance of such employment the defendant did work for the plaintiff in the way of distributing his announcements, and employed others to assist him in so doing, with the knowledge and consent of the plaintiff, and paid them for such assistance, and it was agreed between the plaintiff and defendant that a part of his compensation for so doing should be a cancellation of the plaintiff's claim against him, in respect of the transaction of September 30, 1878, and in consideration of the services rendered by the defendant, and the moneys so by him expended for the plaintiff, that plaintiff agreed to deliver to defendant the order of September 30, 1878, and to cancel all obligations in respect thereof, then the plaintiff can not recover in this action on said order."

This action of the court raises the principal matter of controversy in the present appeal.

An act of the general assembly, approved March 18, 1874, provides thus:

"Every person who shall give any money or other valuable consideration to any person whomsoever, for the purpose of securing the services of such person as a canvasser or electioneerer, in any election held under or in pursuance of the laws of this state, or of any town or city duly incorporated under the laws of this state, and every person who shall give to another any money or

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other valuable thing to be used in paying for vinous, spirituous, or fermented liquors, to be given away or treated at any election, or during the canvass preceding any such election, shall be deemed guilty of a misdemeanor." Session Acts of 1874, sect. 1, p. 54.

In the same act, by section two, it is provided that if any person shall receive any money or property, or other valuable thing whatsoever, "to be used for the purpose of influencing or controlling, or in any manner affecting any such election, or to be used for any electioneering purposes whatever," such person shall be deemed guilty of a misdemeanor. The third section provides that a candidate violating the act shall be ineligible to office, and, if elected, his conviction of the offence shall vacate his office.

This act was not included in the Revised Statutes of 1879, but was kept in force by section one, of the schedule of the state constitution, until altered or repealed by the general assembly, and was further continued in full force and effect by Revised Statutes, section 3161, unless found repugnant to the acts passed or revised at the revising session. We are not referred to any such alteration, repeal, or repugnancy, nor have we found that any exists, unless it may be discovered in Revised Statutes, section 1474, which reads thus: "If any person shall, directly or indirectly, give or procure to be given, or engage to give any money, gift, or reward, or any office, place, or employment upon any engagement, contract, or agreement, that the person to whom, or to whose use, or on whose behalf, such gift or promise shall be made, 'shall, by himself, or any other, procure, or *endeavor to procure*, the election of any person to any office, at any election by the electors, or any public body, under the constitution or laws of this state, the person so offending shall, on conviction, be adjudged guilty of bribery, and punished by imprisonment in the penitentiary for a term not exceeding five years." This law has been in force ever since the revision of 1855,

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and, while we incline to the opinion that the statute first above quoted also remains in full force, yet it is not necessary so to decide for the purposes of this case. The statute last quoted is sufficient for our conclusion, since it clearly indicates the policy of the state. Argument may be offered to show that the contract or agreement between the parties in this case was not within the literal terms of the statutory prohibitions. But the question is not whether a conviction could be had, under the statute, upon the facts disclosed by this record. The only question here is, whether the agreement itself was void, as contrary to public policy? A nomination as the exclusive candidate of a great political party for any public office, is one of the most important features of the machinery which is to work out the ultimate result. Where the predominance of the particular party is conceded, such a nomination is considered equivalent to an election. To "endeavor to procure" the nomination of an individual, is at least a step in the direction of endeavoring to procure his election. It is, therefore, no less a matter of public concern that purity of suffrage shall prevail in the selection of the party candidate, than in the ultimate choice of the officers. Since the law has taken special cognizance of primary elections for delegates to nominating conventions (Session Acts, 1875, p. 54), its protest is yet more emphatic than before, if possible, against making the selection of a party's candidate a subject of bargain and sale. There is a clear distinction between the purchase of services to be devoted only to an advertising of the fact that one is, or desires to be, a candidate, and the purchase of service to be employed in advocating his peculiar merits and eligibility, so as to influence the choice of the voter. No public policy forbids the making of compensation, under agreement or otherwise, for printing or distributing announcements, or for the employment of any proper agency which may bring the fact of a person's candidacy more prominently before the public eye. The informa-

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tion thus disseminated is essential to the intelligent determination of the voter's choice. But it becomes a very different thing, when money is paid or promised for efforts to control the voter's free agency in selecting the object of his suffrage. In the present case, the promise or agreement shown in the testimony and remarked upon in the instructions belongs to the last mentioned class. The defendant was to "work for" the plaintiff's nomination; not as an advertiser only, but as an advocate. We think that the circuit court committed no error in holding that the agreement was void, as against public policy.

It is assigned for error that the court refused to permit the defendant to prove how much time he occupied in canvassing for the plaintiff's nomination. The ruling was correct, not only because no claim for time appeared in the counter-claim, but also for the reasons already given against the propriety of the employment.

The judgment is affirmed, with the concurrence of all the judges.

W. R. ALLEN, Respondent, v. F. H. KRENNING, Appellant.

23a	561
33a	205
23	561
131m	25
23	561
97	*410
97	*411

St. Louis Court of Appeals, December 7, 1886.

1. SPECIAL TAXES. — The assessment of special taxes on property benefitted by street improvement is an exercise of the taxing power.

2. ——— LIMITATIONS. — The provision of the charter of the city of St. Louis, limiting assessments for special taxes to twenty-five per cent. of the assessed value of the property, is in the nature of a tax exemption, and must be strictly construed.

3. ——— This limitation refers to each distinct improvement, and not to the aggregate of all street improvement, which may be chargeable against the property.

4. ——— INTERSECTING STREETS. — A lot at the intersection of two

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streets may be assessed to an amount not to exceed twenty-five per cent. of its assessed value, for the improvement of each street, though the improvements are of the same character, and made at substantially the same time.

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Affirmed.

KEHR & TITTMANN, for the appellant: The cost of improvement can be assessed upon the property only to the extent that it is specially beneffted. 2 Dill. Mun. Corp. [3 Ed.] 756, 759; *Neenan v. Smith*, 50 Mo. 525; *Newby v. Platte Co.*, 25 Mo. 271; *Garret v. St. Louis*, 25 Mo. 511; *Zoeller v. Kellogg*, 4 Mo. App. 153. The reconstruction of both Seventh street and Clark avenue is part of one general plan of street reconstruction. The ordinances and the work were practically cotemporaneous. The aggregate cost of both improvements adjoining the appellant's property exceeds twenty-five per cent. of the assessed value of the property, and, therefore, the tax bill representing the excess is void. City Charter, art. 6, sect. 18, 2 Rev. Stat. 1608; 2 Dill. Mun. Corp. [3 Ed.] sect. 751, sub. 3, pp. 756, 759; *Zoeller v. Kellogg*, 4 Mo. App. 163; *Matter of Walter*, 75 N. Y. 354–59.

LEONARD WILCOX, for the respondent: The assessment of benefits for local improvements is a branch of the taxing power, and hence is a legislative, not a judicial, act; and it would be a valid exercise of this power were the whole cost of such improvements imposed on the adjoining property. *Farrar v. St. Louis*, 80 Mo. 387; *Wright v. St. Louis*, 44 Mo. 463; *Simmons v. The State*, 12 Mo. 270; Dill. Mun. Corp. [3 Ed.] section 737; *Adams v. Lindell*, 72 Mo. 199; 5 Mo. App. 198; Burroughs on Taxation, 381; Cooley on Const. Lim. [5 Ed.] p. 593, sect. 479; *Neenan v. Smith*, 50 Mo. 529. The freeholders did not intend, by the limitation on sec-

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tion 18, of article 6, of the charter, that, when property had been once assessed for local improvements to the extent of twenty-five per cent. of the assessed value, it should forever thereafter be exempt from assessment for benefits conferred by other improvements. *Lexington v. Aull*, 30 Mo. 487; *McCormack v. Patchen*, 53 Mo. 33. Exemptions from taxation are to be strictly construed, and any doubt must be resolved in favor of the taxing authority. *Railroad v. Alexandria*, 17 Gratt. [Va.] 184; *St. Louis v. Ins. Co.*, 47 Mo. 156; *Baltimore v. Grand Lodge*, 17 C. L. J. 259.

ROMBAUER, J., delivered the opinion of the court.

This cause involves the construction of the limitation contained in section 18, article 6, of the charter of the city of St. Louis. The language of the section, so far as the same is involved in the present controversy, is as follows:

"The cost of * * * improvements within the city shall be apportioned as follows: * * * The paving, curbing, guttering, sidewalks, and the materials for the roadways, the repairs of alleys and sidewalks shall be charged on the adjoining property as a special tax, and collected and paid as herein provided. Whenever the estimated special taxes to be assessed against any property shall, in the aggregate, amount to more than twenty-five per cent. of the assessed value of said property, calculating a depth to such property of one hundred and fifty feet, then the assembly shall provide out of the general revenue for the payment of the amount, in excess of said twenty-five per cent. The Board of Public Improvements shall notify the Assembly whenever an ordinance is pending which requires an appropriation out of the general revenue to pay a part of the cost of the improvements therein contemplated."

This suit is on a special tax bill for the reconstruction of part of Seventh street, and the question raised is

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fully presented by a certain affirmative defence set up in a very carefully drawn answer, the substance of which is as follows:

The defendant admits that he is the owner of the premises sought to be charged, said premises being lot 10 and part of lot 11, of block 186, of said city, having a front of seventy-one feet, six inches, on the west line of Seventh street, by a depth westwardly along Clark avenue of one hundred and twenty-seven feet, six inches, to an alley; bounded east by Seventh street; south by Clark avenue; west by said alley, and north by other property in said block; and he admits, as in the petition alleged, that the city is, and on the several days and dates stated was, a municipal corporation, and that section 18, of article 6, of its charter, is correctly set forth in the petition; and the defendant says he is advised that the same constitutes the city's sole warrant or authority for assessing the cost of an improvement upon the adjoining property.

The answer further charges that, in the year 1881, the city, under its said charter powers, entered upon a general system of street reconstruction, the object of which was to remove the then existing pavement in the roadway of streets, and to repave such roadway with granite blocks, or other paving materials, and that, pursuant to such plan of street reconstruction, the city, on March 8, 1882, passed ordinance number 11,936, set out in the petition, for the reconstruction of Seventh street, from Cerre street to Market street, and on June 5, 1882, passed ordinance number 12,131, for the reconstruction of Clark avenue, from Seventh street to Twelfth street, and that the defendant's premises adjoin, front, and border both of said streets. The Clark avenue ordinance provides, in its fifth section, that, whereas the estimated cost of the work to be assessed against some of the lots, fronting or bordering on the proposed improvement, amounts to more than twenty-five per cent. of their assessed value, the excess shall be paid by the city, and an

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amount is set apart for that purpose, which was subsequently increased by amendatory ordinance number 12,-240.

The answer further charges that, shortly after ordinance number 12,131 took effect, the city of St. Louis entered into contract with the plaintiff, Allen, by which the latter undertook to reconstruct Clark avenue from Seventh street to Twelfth street; that he performed his contract, and that, upon the completion of the work, the president of the board of public improvements computed the cost thereof, and levied and assessed the same, as a special tax, against each lot of ground chargeable therewith; and that upon such computation it appeared that the amount chargeable against the defendant's premises was $1,903.38; that the assessed value of the defendant's said property was $6,470; that twenty-five per cent. thereof is $1,617.50, which amount the president of said board levied and assessed against the defendant's premises, and issued and delivered to the plaintiff, Allen, a special tax bill for the same, dated the fifth day of November, 1883, and that the excess of $285.88 was paid by the city; that said special tax bill became a lien on the defendant's said premises on the fifth day of November, 1883; that the plaintiff, Allen, demanded payment of said special tax bill, and that the defendant, in May, 1884, paid him the full amount thereof, with interest. The answer further charges that, at or about the time of the reconstruction of Clark avenue, as aforesaid, or shortly thereafter, the plaintiff, Allen, reconstructed Seventh street, from Cerre street to Market street, under the ordinance and contract recited in the petition; that upon the completion of the work the president of the board of public improvements computed the cost thereof and assessed the sum of $815.13 as the portion of such cost chargeable to the defendant's aforesaid property, fronting or bordering on said improvement; that at the time said improvement was made, as well as at the time of said computation, the assessed value of the defend-

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ant's property was $5,760, and that, notwithstanding the fact that the defendant's property was already charged with, and then subject to, a valid special tax for twenty-five per cent. of its assessed value for the reconstruction of Clark avenue, the president of said board levied and assessed the further sum of $815.13 against said property for the reconstruction of Seventh street, and on the twelfth day of April, 1884, issued and delivered to the plaintiff, Allen, for the same, the special tax bill recited in the petition.

The answer further charges that the aggregate amount of said two special tax bills is $2,718.51, and, therefore, more than forty-two per cent. of the highest assessed value of the defendant's premises, and $1,101.01 in excess of the maximum which may rightfully be assessed against his premises for street reconstruction, under the charter of the city.

The answer further alleges that the defendant is advised that, by reason of the facts aforesaid, the special tax bill recited in the petition was levied without authority of law, and in violation of the charter of the city of St. Louis, and that said tax bill is, therefore, void; and the defendant prays judgment accordingly, and that said tax bill be cancelled.

The plaintiff, Allen, demurred to all that part of the defendant's answer, which follows the general denial of the plaintiff's cause of action, for the following reasons:

1. The part demurred to states no fact constituting a defence to the plaintiff's cause of action.

2. The part demurred to states no facts entitling the defendant to the relief prayed for, or to any other relief.

3. The facts stated by the defendant show that the tax sued for was a separate and independent assessment, in no way connected with the assessment first mentioned in said answer.

The court sustained the demurrer, to which the de-

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fendant then and there excepted, and declined to plead further. And the cause coming on for trial, the plaintiff, against the defendant's objection, offered and read in evidence the special tax bill sued on, and rested.

The defendant thereupon offered to prove each and every fact alleged in the new matter or affirmative allegations of his answer, to which proof and every part of it the plaintiff objected; and the court sustained the objection, and refused to receive said evidence, or any part of it, on the ground that said facts do not constitute a defence to said special tax bill, to which action of the court, in sustaining said objection and excluding said evidence, the defendant then and there duly excepted.

The court rendered judgment for the plaintiff, and on the same day the defendant filed his motion for new trial, which being overruled he appealed.

The defendant now assigns for error that the circuit court erred:

1. In sustaining the demurrer to the answer.

2. In excluding the evidence offered by the defendant at the trial.

3. In admitting the tax bill against the defendant's objection.

4. In rendering judgment for the plaintiff, when, upon the facts and the law, the judgment should have been for the defendant.

Whether these errors are well assigned or not, depends upon the proper answer which is to be given to this question.

In determining the limitation of twenty-five per cent. contained in section 18, of article 6, of the charter, must all special taxes heretofore assessed against the property for street construction be taken into consideration, or all special taxes assessed for the construction done under one continuous plan of improvement, or only the special taxes under the provisions of one ordinance?

Unless there is some latent ambiguity in the language containing the limitation, that question must be

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decided by the ordinary meaning of the words employed. In case there is such ambiguity, other provisions of the charter, and the state of the law prior to its enactment, may be examined in solving the ambiguity.

The only ambiguity arises by reason of the fact that the word, taxes, is used in the plural, and that the limitation applies to their aggregate, and hence the defendant contends that the limitation contemplated more than one tax, and that the twenty-five per cent. limit is reached when all the taxes thus assessed, in the aggregate, exceed twenty-five per centum, or, at least, when all the taxes assessed under one continuous plan of improvement, in the aggregate, exceed twenty-five per centum.

On the other hand, the plaintiff contends that such construction is at war, not only with the sense of the words employed, but with other provisions of the charter. That the limitation refers to estimated taxes to be assessed, and thus their aggregate inferentially excludes taxes heretofore assessed; and that, while the charter does not, in express words, require that the improvement of each street shall be provided for by separate ordinance, it clearly so contemplates, as from the construction of each street a separate and independent benefit is supposed to arise to the property fronting thereon.

When the present city charter was adopted, there was no limitation, either by legislative provision, or judicial construction, on the city's power in levying these special taxes. The courts had uniformly decided that the city's power, under former charters, to improve its streets and charge the cost of the improvement on the adjoining property, was a continuing power. That this power might be exercised from time to time, as the wants of the municipal corporation might require, and that, of the necessity or expediency of its exercise, the governing body of the corporation was the sole judge. *McCormack v. Patchin*, 53 Mo. 33. It is true that the theory upon which the constitutional validity of such taxes was

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upheld was one of a corresponding special benefit resulting to the property from the improvement (*Neenan v. Smith*, 50 Mo. 525), but since the property owner could never be heard to say that his property had not, in fact, been benefitted, in opposition to the legislative declaration that it had, the theory of assessment was one which he could never practically controvert. *Seibert v. Tiffany*, 8 Mo. App. 33.

An instance of seeming departure from the law, as above stated, is found in *Zoeller v. Kellogg* (4 Mo. App. 163), where the court held that the assessment of a special tax, in excess of the entire value of the lot, was equivalent to confiscation, and could not be upheld on the theory of a special benefit to the lot; but it will be noticed that the court arrived at that result by treating the assessment as being in the nature of an exercise of the right of eminent domain, and not as an exercise of the taxing power, a holding which, in view of subsequent decisions of the supreme court, is not tenable. *Farrar v. City of St. Louis*, 80 Mo. 379, 394; 2 Dill. Mun. Corp., sect. 752. We thus find the law prior to the adoption of the present charter, as conferring upon the city a power in levying these special taxes, practically unlimited by anything but the discretion of the governing body of the corporation. The limitation is in the nature of a restriction of a pre-existing power, and so far as the property owner is concerned, an exemption from taxation, and as such to be construed strictly. Assuming that the clause could, with equal reason, be construed to mean, either what the plaintiff claims, or what the defendant claims it does mean (and that is the best that can be said for the defendant's claim), and it results that the plaintiff's construction must prevail, because as to him, representing the municipality, the clause is a restriction of a pre-existing power, but as to the defendant it is the grant of a new exemption.

The defendant further claims that the paving of the two streets was but one improvement. He contends that

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the answer distinctly states that, in the year 1881, the city, under its charter power, entered upon a general system of street reconstruction, and that the two ordinances in question were passed pursuant to such plan of reconstruction, and that this allegation in the answer is admitted to be true by the demurrer.

Aside from the fact that the demurrer only admits facts which are well pleaded, and that the defendant failed to plead any ordinance evidencing such general plan of reconstruction, it is apparent that the plea is defective. The question is, not whether the reconstruction of the two streets was part of the same general plan, but whether, in fact, the reconstruction of both streets constituted but one improvement.

The defendant maintains that the reconstruction of both streets constituted but one improvement, and refers us to the case of *Matter of Walter* (75 N. Y. 354), as sustaining that view.

The question in that case arose under the following provision: "Commissioners or assessors, for making estimates and assessments for any improvements authorized by law to be assessed upon the owners or occupants of houses and lots, or improved or unimproved lands, shall in no case assess any house, lot, improved or unimproved lands, more than one-half the value of such house, lot, improved or unimproved lands, as valued by the assessors of the ward in which the same shall be situate." *Matter of Schell*, 76 N. Y. 433. The estimates for improvements included the regulating, grading, setting of curb and gutter stones, and flagging Manhattan street, and the paving of Manhattan street, under two different resolutions of the Board of Common Council, one approved April, 1871, and the other May, 1872. The whole work, however, was done under one resolution of the department of public parks, which resolution, as the court found, was the acknowledged source of authority for the work. Two assessments were made, one for each class of work, neither amounting in itself to one-half of

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the assessed value of the property, but both together amounting to more than one-half.

Upon this showing the lower court refused to relieve the petitioner, and dismissed his petition. The court of appeals reversed this ruling, and in its opinion, delivered by Judge Folger, said: "We are unable to conclude, from the record before us, that the work, for which these two assessments were laid, was necessarily two distinct improvements, and that it was not one improvement. If one improvement, then there should have been but one assessment; and if but one assessment, it could not have exceeded the half assessed value of the lots; and as it has exceeded that, it is, in some extent, at least, illegal. It was laid without power to do so, and in direct violation of statutory restriction and prohibition, and there is substantial error in it, not to say fraud."

It will be noticed, however, that the entire improvement in that case was done on one street, and under one resolution of the department of public parks, and that it was the lapse of time alone, intervening between the orders for the two classes of work, by which it was claimed the two classes of work constituted separate improvements. The court, in its opinion, conceded that, "If the paving of a street is so disconnected from other work on a street in necessity and effect, as to be a different improvement from grading, regulating, setting of curb and gutter stones, and flagging, or if the adoption of a peculiar kind of pavement is so, then there may be said to have been two classes of improvements upon the street," but it denied that such was the case shown by the record before it.

There is nothing, therefore, in that case which would justify us to hold in this, that the paving of the two streets, under the circumstances stated in the answer, constituted but one improvement.

It is to be deplored that, on a question of so much importance to property holders as the one under consideration, the framers of the charter neglected to employ

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language free from all ambiguity. The assessment of street improvements exclusively on the adjoining property may be erroneous in principle, and may work in certain cases, as it unquestionably has done in this, great hardship to the adjoining owner. The remedy for the evil must be sought in a change of the charter provision by the people, and not by an attempt on the part of the courts to work out an equity by judicial declarations, which are opposed to recognized rules of construction.

All the judges concurring, the judgment is affirmed.

G. KAUFFMAN ET AL., Respondents, v. HENRY F. HARRINGTON, Appellant.

St. Louis Court Appeals, December 7, 1886.

1. **APPELLATE PRACTICE—REVIEW—EXCEPTIONS—MOTION FOR NEW TRIAL.—Appellate courts will not review objections made at the trial unless proper exceptions are saved at the time and by motion for a new trial.**

2. **INSTRUCTIONS—MUST BE RELEVANT.—Instructions which are not relevant to the issues are properly refused, notwithstanding they embody correct propositions of law.**

APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Affirmed.

NATHAN FRANK, for the appellant: All that was relevant was the amount of the judgments and the date of the confessions, and the parties' statements therein contained were immaterial and irrelevant. *Foster v. Nowlin*, 4 Mo. 1; *McMahan v. Geiger*, 73 Mo. 145; Freeman on Judgments.

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MILLS & FLITCRAFT, for the respondents: The point is not made in the motion for a new trial, and this court will not consider the objection when urged here for the first time. *Daily v. Singer Manfg. Co.*, 14 Mo. App. 597; affirmed in S. C., 88 Mo. Rep., 301; *Girls' Ind. Home v. Fritchey*, 10 Mo. App. 344; *Ward v. Quinlivan*, 65 Mo. 453.

ROMBAUER, J., delivered the opinion of the court.

This is an action of replevin whereby the vendor seeks to assert his title and right of possession to certain merchandise, claiming that its sale was voidable for fraud. The merchandise at the date of its seizure under this writ, was in possession of the defendant who as sheriff had seized it under a writ of attachment issued at the instance of one of the vendee's creditors. The plaintiff recovered judgment in the trial court, the jury under the instructions of the court finding that the sale was voidable, because the merchandise was purchased by the vendee with a fraudulent intent of never to pay for the same.

There is no complaint made here that the instructions given were erroneous, but the appellant relies on the following points for reversal. 1. That the court erred in permitting the plaintiff to read to the jury the statements forming part of certain confessions of judgments made by the vendee preceding his failure. 2. That the court erred in permitting counsel for the plaintiff in his argument to the jury to go outside of these statements and make unwarranted inferences. 3. That the court erred in refusing to instruct the jury that the vendee had a right to confess these judgments. 4. That certain irrelevant and incompetent testimony was admitted on an issue not submitted to the jury.

On the first point it may be said, that when the statements forming part of these confessions were offered in evidence, the court intimated that they were admis-

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sible for the purpose of showing when the indebtedness thereby secured was contracted. The financial condition of the vendee at the date of the purchase in question was a legitimate inquiry as bearing upon the intention of the purchaser in making the purchase, and evidence of any fact bearing upon that question was clearly relevant. Moreover the record fails to disclose that the defendant's objections to this testimony were placed on any specific ground, which of itself would justify the trial court in disregarding them. *Rosenheim v. Ins. Co.*, 33 Mo. 230, 235; *Coughlin v. Haeussler*, 50 Mo. 126, 129.

The objection that counsel's argument to the jury was improper cannot be entertained here, as the remarks were not objected to when made, and are not even complained of by motion for new trial. *The State v. McChesney*, 16 Mo. App. 259, 270.

The instruction that the vendee had a right to confess the judgments offered in evidence was properly refused. It was an instruction assuming facts and entirely foreign to the merits of the controversy. The judgments were offered in evidence for the purpose of showing the vendee's financial condition at their date, and by inference his probable financial condition at the date of the purchase. No claim was based by the vendor, under the issues submitted to the jury, on any fraud in these confessions.

The admission of the irrelevant testimony complained of, consisted in certain declarations made by the vendee as to his financial condition anterior to the purchase. When this testimony was offered, the plaintiff's counsel stated that he intended to show that the sale was made on the faith of these representations. Not succeeding in this to the satisfaction of the court, the court at the close of the testimony withdrew this issue from the consideration of the jury. This was proper and in conformity with the intimation of the supreme court in *Glascock v. Railroad* (69 Mo. 589, 592).

Although no point is made by the appellant here,

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objecting to the verdict as not supported by substantial evidence, yet, as that point was made in the trial court, both by demurrer to the evidence and motion for new trial, we have examined the testimony for the purpose of determining the merit of that objection, and find that it is not well taken.

All the judges concurring, the judgment is affirmed.

S. W. HUTCHINSON, Appellant, v. W. DORNIN, Respondent.

St. Louis Court of Appeals, December 7, 1886.

1. **PROMISSORY NOTE—CONSIDERATION.—In an action on a promissory note by the payee against the maker, proof that the note was given in part payment of expenses incurred in defending persons charged with crimes, does not make out the defence of illegal consideration.**

2. **—— The consideration of the note being contested, an admission by the maker that he was indebted to the payee, coupled with a denial that the note was given on account of such indebtedness, will not authorize the court to render a judgment for the payee as a matter of law.**

APPEAL from the St. Louis Circuit Court, W. H. HORNER, Judge.

Reversed and remanded.

ELLERBE & HICKS, for the appellant: There was nothing unlawful in the agreement. *Lehnsdorf v. Shields*, 13 Mo. App. 487.

ROWE & MORRIS, for the respondent: Where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will

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not lend its aid to enforce it. *Armstrong v. Toler*, 11 Wheat. 279; *Buckingham v. Fitch*, 18 Mo. App. 99.

ROMBAUER, J., delivered the opinion of the court.

This is a suit upon a promissory note by the payee against the maker. The defence is want of consideration and illegal consideration. There was judgment for the defendant in the court below.

The testimony tended to show that the plaintiff and the defendant had been jointly engaged in the illegal business of selling lottery tickets. That in December, 1882, they abandoned the further prosecution of their business, and had a settlement resulting in a credit balance of six hundred dollars, of which each party was entitled to one-half. That thereafter criminal prosecutions were instituted against certain persons theretofore employed by the plaintiff and the defendant as ticket sellers, and the plaintiff and the defendant, considering themselves under a moral obligation to defend their former employes, agreed that the sum of six hundred dollars, above mentioned, should be used for that purpose, and it was turned over to the plaintiff to be thus used.

The testimony tended to show further, that the defendant authorized the plaintiff to expend on their joint account all sums necessary for the defence of these persons, and that the plaintiff did, in fact, expend for that purpose $1458.25, being $858.25 in excess of the said sum of six hundred dollars, and that he had not been reimbursed by the defendant, any part of such excess, at the date of the note in controversy.

The plaintiff testified that the note in suit was given to reimburse him in part for the expenditures thus made by him, while the defendant testified that he had never authorized the plaintiff to expend more than the six hundred dollars above mentioned, and that the note was given as a mere accommodation to the plaintiff, and had nothing to do with the transactions above mentioned.

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This being substantially all the testimony, the plaintiff asked the court to give the following instruction to the jury:

"The court declares the law to be that, if it appears from the evidence that the plaintiff expended a sum of money in payment of fees for attorneys engaged in defending certain persons charged with a criminal offence, and in payment of court costs and fines imposed in such cases, and that such expenditure was made in pursuance of and under an agreement between plaintiff and defendant that such expenditures should be made, and that defendant would bear one-half thereof, and reimburse the plaintiff to that extent; and if the note sued on was made by the defendant and delivered to the plaintiff, on account of and for a portion of the defendant's share of such expenditure, and in consideration thereof, then the finding should be for the plaintiff, although it appears also from the evidence that the plaintiff and the defendant had been engaged in an illegal lottery business, which had been abandoned by them prior to such expenditures, and that the offence charged against such persons was the selling of tickets theretofore issued in the course of said lottery business."

The court refused this instruction, and at the instance of the defendant, instructed the jury in substance that the plaintiff could not recover if the consideration of the note was money expended in defending the former employes of the parties, and paying the fines imposed on them.

This action of the court is assigned for error by the appellant.

The instruction asked by plaintiff states the law correctly and should have been given. The proposition contended for by the defendant, that a contract, though it be a new contract, is void if connected with an illegal transaction and growing immediately out of it, is not

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denied, but finds no application in this case. The case finds that the illegal transactions had been consummated, and their further continuance had been abandoned. The agreement on the part of the plaintiff and the defendant, to defend their agents, who had become liable to certain penalties owing to their former employment, was no part of the scheme of embarking in the illegal sale of tickets, as far as the record discloses. The agreement to defend these men at joint expense, was an agreement to do a thing prohibited by neither the letter nor the policy of the law. It does not even appear that the agreement was entered into with a corrupt motive, although even if such were the case, that fact would not make it illegal. *Lehndorf v. Schields*, 13 Mo. App. 488.

We are asked by the appellant to enter judgment in his favor in this court. The record does not admit of that disposition of the case. In order to enable us to do so it should appear by the uncontroverted facts, not only that the defendant was indebted to the plaintiff at the date when the note was given, but also that the note was given on account of such indebtedness. This last proposition is likewise controverted by the defendant, and must be submitted to the triers of the fact, under appropriate instructions.

The date of the note sued on is given in the transcript as February 11, 1874, instead of 1884, but as the parties in their statements, arguments, and instructions, assumed that 1884 is the correct date, we felt justified to assume that the date in the transcript is a clerical error.

The judgment is reversed and the cause remanded. All the judges concur.

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PLANT SEED COMPANY, Appellant, v. MICHEL PLANT & SEED COMPANY, Respondent.

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St. Louis Court of Appeals, December 7, 1886.

1. **EQUITY—INJUNCTION—TRADE NAME.—The use of a corporate name similar to that used by another corporation can not be enjoined, if its adoption and use are in good faith and without fraudulent intent.**

2. **——— PLEADINGS.—A petition which states that the adoption and use of the name were with the fraudulent intent of appropriating the plaintiff's trade, that the public were deceived, and the plaintiff's trade diverted to the defendant thereby, states a case for equitable relief.**

3. **PRACTICE—DEMURRER.—A demurrer admits the truth of the averments of the petition and the demurrant can not afterwards claim that the facts stated are improbable.**

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Reversed and remanded.

LEONARD WILCOX, for the appellant: A corporation, as well as an individual, may be enjoined from the use of a name where it appears that it is an unlawful infringement on the name used by or belonging to another, even if such name be its corporate name. 1 High on Injunctions, sect. 5907; *Ex parte Walker*, 1 Tenn. Ch. 101; *Holmes, etc., v. Holmes, etc., Co.*, 37 Conn. 279; Gen. Stat. of Conn., 1866, pp. 170, 173, sects. 393, 405; *Goodyear Rubber Co. v. G. R. Mf'g Co.*, 22 Blatch. C. C. R. 421; Morawetz on Priv. Corp. [2 Ed.] sects. 354, 1064; *Wallace v. Loomis*, 97 U. S. 154; Ang. & Ames on Corp. [11 Ed.] 432, 433; *Boogher v. Life Ass'n*, 75 Mo. 323; *Bridge Co. v. Prange*, 35 Mich. 400, 403; *Ins. Co. v. Needles*, 113 U. S. 580. The resemblance between the name

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adopted by the defendant company and the plaintiff's name is sufficiently close to justify the court to interfere by injunction. *Gamble v. Stephenson*, 10 Mo. App. 581; *Sanders' v. Utt*, 16 Mo, App. 324; Browne on Trade-Mark [2 Ed.] sects. 33, 228, 385; *Glenny v. Smith*, 11 Jur. [N. S.] 964. The corporate name of the defendant company was adopted in violation of an express statute, and its use may be enjoined at the suit of a private party. Rev. Stat. 1879, sects. 926, 957; Pomeroy's Eq. Jur., sects. 252, 1347, 1349; *Overall v. Ruenzi*, 67 Mo. 203, 207; *Matthis v. Town of Cameron*, 62 Mo. 504, 506; *Hayden v. Tucker*, 37 Mo. 214; Wood on Nuisances [2 Ed.] 904; High on Injunctions, sects. 897, 901, 907. An injunction will lie at the suit of the person injured, to prevent the use by another of generic terms or other names common to the public, for the fraudulent purpose of diverting his custom. *Lee v. Haley*, 5 Ch. App. cases 155; *Glenny v. Smith*, 11 Jur. [N. S.] 694; *Boswell v. Mathie*, 11 Sess. Cases [Rettie] 1072; *Matsell v. Flanagan*, 2 Abb. Pr. R. [N. S.] 459; *Churton v. Douglass*, 28 L. J. Ch. 841; *Pierce v. Guitard*, 8 Pac. R. 645, 637; *Bouluois v. Peake*, 13 Ch. Div. 513 *n;* Browne on Trade Marks, sects. 34, 522; 3 Pomeroy's Eq. Jur., sect. 1354; *Marsh v. Billings*, 7 Cush. 331.

KLEIN & FISSE, for the respondent: The action of the state authorities in permitting a corporation to adopt a particular name, either upon its organization, or subsequently, is conclusive; and that the right of the company to employ that name is not subject to be collaterally attacked. *Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co.*, 21 Fed. Rep., 277; 1 Morawetz on Corp., sects. 353, 354. In dealing with cases of trade names, even if the two names are identical, the courts, before granting any injunction, require clear proof that the defendant adopted and continued to use the name for the purpose of palming off his wares as the wares of the plaintiff. *Meneely*

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v. Meneely, 62 N. Y. 427; *Phelan v. Callender*, 6 Hun, 244; *Carmichael v. Latimer*, 11 R. I. 395; *Faber v. Faber*, 49 Barb. 405; *Landreth v. Landreth*, 22 Fed. Rep. 41. If the two names are not strictly identical, but are merely similar, stronger proof of this fraudulent purpose is demanded. 10 Cent. L. J. 481.

ROMBAUER, J., delivered the opinion of the court.

This is a trade name case. As the judgment appealed from was rendered on demurrer, it will be necessary only to set out the amended petition and the grounds of demurrer thereto.

The petition was as follows:

"Plaintiff for cause of action states that it is a private business corporation duly incorporated under and pursuant to the laws of the state of Missouri; that it was so incorporated on the —— day of November, 1872, and is located and has its chief place of business in the city of St. Louis, state of Missouri.

"That the defendant is likewise a corporation duly incorporated under the laws of the said state of Missouri, and is also located and has its chief place of business in said city of St. Louis; that it was so incorporated originally in the year 1878 under the corporate name, 'H. Michel and Company;' that at all the times hereinafter mentioned the defendants, Henry Michel and Ernest Michel, were and still are directors in said defendant corporation, constituting a majority of the same and owning nearly all the stock therein. That from the time of its incorporation down to the present time plaintiff has been continuously carrying on the business for which it was and is incorporated, to-wit: The dealing in, buying and selling, garden, farm, grass, vegetabe, flower, grain, and other kinds of seeds and plants; that it has so carried on said business in said city of St. Louis, and was originally incorporated under and has always used and been known by the corporate name, 'Plant Seed

Company,' the name 'Plant' being the family name of the principal stockholders.

"That it has always exercised great care in the selection and purchase of the seeds and plants purchased to be sold to its customers, and thereby at, and long before the grievances herein complained of, had become widely known and acquired a high reputation throughout the city of St. Louis, the states of Illinois, Kansas, and Missouri, and all the surrounding region, by said corporate name, as a dealer in seeds and plants of the kind aforesaid, which could be relied on as seminiferous and productive, and if properly sown to germinate and grow and produce grasses, grain, and vegetables after their kind; that prior to the grievances hereinafter complained of, plaintiff had expended large sums of money in establishing and advertising its said business under its said corporate name, and thereby prior to said time had come to be widely known by said name, and had made said name valuable and profitable to itself and had come to command a large and profitable trade in the articles and merchandise aforesaid.

"That the defendant corporation has been, since its organization, engaged principally in the business of growing, dealing in, and selling flowers. That persons engaged in such business are usually and commonly known as, and are called, florists; that, although they do deal in flower plants, yet they are not commonly, nor usually spoken of, nor are they generally known as dealers in plants; that the defendant corporation, during all the time last aforesaid has also dealt in seeds of the same kinds as those dealt in by the plaintiff, as hereinbefore alleged, but persons engaged in such business are not commonly nor usually known or spoken of as dealers in plants; that notwithstanding the long and quiet use, and enjoyment of its said corporate name by plaintiff, the defendant corporation, and particularly the other defendants, who are the sole directors therein, and

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control or own nearly all the capital stock thereof, being well aware of the premises, and intending and designing to injure and defraud, and for the purpose of injuring and defrauding, plaintiff in its business, and misleading and deceiving the public, and securing to themselves and reaping the benefit of the reputation and trade acquired by the plaintiff, as aforesaid, and decoying persons into their store, who wished and intended to trade with the plaintiff, and leading them to suppose they were in the plaintiff's store, did, on or about the——— day of———, 1880, and contrary to the statute in such case, made and provided, the said defendant corporation being then and there engaged in the business already stated, and having its principal place of business in the city of St. Louis, as aforesaid, change the name of the said defendant corporation, viz.: 'H. Michel & Company,' to the name 'Michel Plant & Seed Company,' and opened stores in the said city of St. Louis, where they carried on the said business under the said last mentioned name, and on the ——— day of October, 1885, rented a store on the same street on which the plaintiff's store is situated, and within two blocks thereof, on the outside and windows of which stores, and especially of said last named store, they have painted and fastened large signs bearing the name 'Michel Plant & Seed Company,' in large letters, in such place and manner that it would and does attract the attention of the public, and have been ever since the said last named day, and are still, printing and distributing throughout the city of St. Louis, and the states and region aforesaid, in large numbers, pamphlets, hand-bills, and circulars, with their said last mentioned corporate name printed on the outside thereof, in large letters, and have been, and still are, advertising the business of the said defendant corporation under the said name in the newspapers.

"But the plaintiff says that with the same fraudulent purpose and intent as aforesaid, wherever, on said

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signs, stores, windows, circulars, pamphlets, and in said advertisements, defendants have caused the new corporate name aforesaid, to be painted or printed, it is painted or printed with the single character or signs sometimes used to represent and stand for the word 'and,' instead of that word in full, between the words 'Michel' and 'Plant,' and in such manner that it would not be, and is not readily noticed by the public.

"By reason of which fraudulent and wrongful acts of defendants, the plaintiff says great confusion has arisen among the persons accustomed to deal with the plaintiff, and many of them have been decoyed into the defendant corporation's stores, and led to purchase seeds, and other like merchandise of it, supposing they were purchasing of plaintiff, and that letters intended for plaintiff have been, by reason of persons being confused in the similarity of names, so addressed that * * * they have reached the defendant corporation instead of plaintiff, and by reason of the premises plaintiff has been greatly injured, and has lost, and will lose, a great deal of custom, and the profit to be derived therefrom, which has in times past come, and would, if it were not for said wrongful acts, in future come to the plaintiff.

"Wherefore, the plaintiff prays the court to make an order restraining the defendant corporation, and the said other defendants, their agents or servants, from using, in the business of the said corporation, or on its signs, pamphlets, or circulars, or in its advertisements: 1. The said corporate name 'Michel Plant & Seed Company'; 2. The word 'Plant' as a part of said name; 3. The word 'Plant' in, or a part of said name, so arranged with reference to, or so connected with, the word 'Seed' as to simulate or imitate the plaintiff's corporate name and deceive the public; 4. The words 'Plant & Seed,' as now used by the defendant corporation in its said name, or said words, in the same order in which

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they now appear in plaintiff's corporate name, or connected with a character to indicate the word 'and,' without having the said word printed in full with letters of the same character, size, and appearance as the other words, in the same name, and for such other and further relief as to the court may seem proper."

The defendants demurred to this petition upon the following grounds: (1) Because it does not state facts sufficient to constitute a cause of action. (2) The amended petition fails to state any facts entitling the plaintiff to any equitable relief. (3) It appears on the face of the amended petition that the plaintiff has lost whatever rights it may have had in the matter complained of therein, by its long delay and laches. (4) Because the matters complained of are subject to be inquired of only at the suit of the state of Missouri.

The court sustained the demurrer; the plaintiff refused to plead further, and final judgment for the defendants was rendered by the court. The plaintiff then appealed.

The plaintiff, appellant, contends that the petition does contain facts sufficient to constitute a cause of action, and assigns for error that the demurrer was improperly sustained.

It is evident that but for the allegation of the defendants' fraudulent intent, coupled with the injury resulting therefrom to the plaintiff, the petition would have been demurrable. It states no facts which, omitting the elements above stated, the defendants might not lawfully have done. It is also true that the motive with which a lawful act is done is, as a general rule, immaterial. But an act done with a fraudulent motive, and inflicting damage upon another person, is never a lawful act, because it has long been established in our jurisprudence, that the concurrence of fraud and damage in such cases causes an injury which gives rise to a cause of action.

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Starting from these premises the following result follow:

The defendants' demurrer admits that all facts which are well pleaded in the plaintiff's petition are true. The defendants' fraud is sufficiently well pleaded because, under our practice act, a general allegation of fraud is sufficient. *Edgell v. Sigerson*, 20 Mo. 494; *Fox v. Webster*, 46 Mo. 184. Nor is it conceivable how a fraudulent intent and motive is capable of a more specific designation than a mere statement. The demurrer, therefore, admits the fraudulent intent with which the acts complained of were done, and further admits that they resulted in causing damage to the plaintiff by decoying persons into the defendants' store, and causing them to purchase the defendants' merchandise, supposing that they were purchasing of the plaintiff. As facts are more conclusive than theories, it is futile to argue that persons were not likely to be thus misled by anything that the defendants' did, when it stands admitted by the demurrer that they were.

Nor is the petition demurrable on the ground of showing laches. That objection at most affects part of the relief sought, as some of the acts complained of and sought to be enjoined are quite recent. As was said in *Sanders v. Jacob* (20 Mo. App. 99), where the element of fraud supervenes, lapse of time does not purge the defendant's conduct of this taint, and if the defendant, at a recent period of time, aggravates the wrong by moving his place of business nearer to that of the plaintiff, and by there erecting signs similar to the plaintiff's, with the intent of deceiving the trading public, it furnishes a case for equitable interposition.

All the judges concurring, the judgment is reversed and the cause remanded.

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T. E. BENNETT, Appellant, v. ST. LOUIS CAR ROOFING COMPANY, Respondent. 23 587 / 96 *617

St. Louis Court of Appeals, December 7, 1886.

1. CORPORATIONS—OFFICERS—SALARY CONTRACTS.—A charter officer having been elected for one year, a resolution fixing his salary at a sum certain per month does not necessarily fix that rate for the year.

2. MASTER AND SERVANT—ACTIONS FOR VALUE OF SERVICES—WRONGFUL TERMINATION OF CONTRACT. — One hired for a period certain, and wrongfully discharged before its expiration, can not recover on the theory of constructive service for services he has never performed. His proper action is for damages caused to him by the wrongful discharge.

APPEAL from the St. Louis Circuit, Court AMOS M. THAYER, Judge.

Affirmed.

FRANK M. ESTES, for the appellant: Contracts for personal services are entire, and can not be apportioned. The obligations of the parties are reciprocal. *Garp v. Tyler*, 73 Mo. 617; *Dorrus v. Smit*, 15 Mo. App. 583; *Hanel v. Freund*, 17 Mo. App. 620; *Henson v. Hampton*, 32 Mo. 408; *Arnold v. School Dist.*, 73 Mo. 226; *Plummer v. Frost*, 81 Mo. 425. The company had no right to discharge the plaintiff, except for cause. The company exceeded its powers by the resolution of December 28. *Cheney v. Railroad*, 68 Ill. 570; *Trustees, etc., v. Shaffer*, 63 Ill. 243. In construing an instrument, the evident intention of the parties should be taken into consideration to give it its proper legal effect. 2 Pars. on Cont. 623; *Mallan v. May*, 13 M. & W. 511; 14 L. J., Ex. 48; *Rubey v. Coal & M. Co.*, 21 Mo. App. 167.

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LEO RASSIEUR & DEXTER TIFFANY, for the respondent: In a suit for services rendered under a contract, the plaintiff can recover only if he proves the existence of the contract, and also its performance. *Eyermann v. Mt. Sinai Cem. Ass'n*, 61 Mo. 491.

ROMBAUER, J., delivered the opinion of the court.

On the first trial of this cause the court below rendered judgment in favor of the plaintiff on the admissions of the answer. We held on the defendant's appeal that the averments of the pleadings did not admit of that disposition of the cause, and remanded it for new trial. 19 Mo. App. 349.

The pleadings were amended before the cause was re-tried. The contention between the parties was whether the plaintiff had a contract with the defendant corporation for an annual hiring at a fixed compensation, and whether he had performed the services contemplated by such contract. The petition asserted the affirmative of these two propositions, and claimed a balance due, which is admitted to be correct, if the two propositions are established by the evidence. The answer denied both propositions.

The plaintiff relied upon the following minute entry in the corporate records, as constituting the contract sued upon.

"JULY 1, 1883.

"The election of officers for the ensuing year took place, and the following officers were unanimously elected: Theodore Plate, pres. and treas.; Thomas E. Bennett, v.-pres. and secretary, and John C. Wand, sup. and contr. agent. On motion of Mr. Plate, the salaries of the above named officers were fixed at $150 per month for each person."

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The plaintiff also gave evidence tending to show that besides the routine duties of secretary, he was expected to, and did, for a time, do other duties for the corporation, such as keeping accounts, collecting bills, etc. None of these additional duties, however, were performed after February 1, 1884.

The defendant relied on the action of its board in December, 1883, resolving that from and after February 1, 1884, the office of secretary would cease to be a salaried office, and gave evidence tending to show that the plaintiff, even prior to that date, failed and refused to perform such additional duties, as the contract of hiring contemplated.

The court declared the law to be that the resolution of July 1, 1883, offered in evidence, was a contract for hire by the month. That such contract was terminated, by the resolution of December 28, on the first of February, 1884, and as the plaintiff admits to have been paid in full to February 1, 1884, he could not recover.

The court, thereupon, found for the defendant.

The plaintiff appealing assigns this declaration of law for error, and claims that the judgment should have been in his favor on the uncontroverted facts.

We are inclined to hold that the declaration of law made by the court was proper. The mere election of the plaintiff as a corporate officer for a year, gave him no vested right to enjoy a compensation during the entire year, which was fixed, by resolution, on a monthly basis, unless the hiring was such that the plaintiff, too, became bound by it for the entire year. But this appears neither by the resolution nor by the testimony *dehors*. Regardless of that fact, however, the plaintiff is in no position to complain, because the testimony is clear that he agreed to perform certain duties for the stipulated compensation, and that after February 1, 1884, he failed to per-

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form them. As he avers performance and fails to prove it, he can not recover damages for a wrongful discharge. The two actions are different in their scope and measure of damages. *Ream v. Watkins*, 27 Mo. 517; *Sherman v. Champion Transit Co.*, 31 Vt. 162.

All the judges concurring, the judgment is affirmed.

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JEROME B. LEGG, Appellant, v. J. H. JOHNSON, Respondent.

St. Louis Court of Appeals, December 7, 1886.

1. INSTRUCTIONS—IRRECONCILABLE.—The giving of instructions covering the entire case, and which are so contradictory in part as to be irreconcilable, is error for which the judgment will be reversed.

2. ——— AMBIGUOUS.—An instruction which is so ambiguous as to admit of two constructions is misleading and erroneous.

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Reversed and remanded.

TAYLOR & POLLARD, for the appellant: A contradiction between two instructions, so far from correcting the evils of either, multiplies them both. *Turner v. Babb*, 45 Mo. 387; *Henshen v. O'Bannon*, 56 Mo. 289; *Goetz v. Railroad*, 50 Mo. 472; *The State v. Mitchell*, 64 Mo. 191; *The State v. Nauert*, 2 Mo. App. 295; *Stevenson v. Hancock*, 72 Mo. 614; *Price v. Railroad*, 77 Mo. 512; *The State v. Simms*, 68 Mo. 309; *Staples v. Town of Canton*, 69 Mo. 594.

BOYLE, ADAMS & MCKEIGHAN, for the respondent.

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ROMBAUER, J., delivered the opinion of the court.

The main controversy of fact in this cause is, whether the defendant in certain transactions involving the purchase of property by the plaintiff, acted as a vendor principal, or as the plaintiff's agent.

The petition charges, in substance, that the defendant fraudulently represented to the plaintiff that certain mining property in which he, the defendant, was interested as co-owner, was of great value, and that owing to the need of some of the other owners of the property, their interests in this and some adjoining property could be bought at a very low figure. That if the plaintiff would buy out one of such part owners the defendant would buy out another, and attend to all negotiations of purchase without any cost to the plaintiff. That the defendant further falsely represented that twenty-five hundred dollars was the lowest price at which either of such co-owners would sell, and upon such representations obtained from the plaintiff twenty-five hundred dollars to complete the purchase, but instead of so using said money, used only one thousand dollars, which was all that was required for the contemplated purchase, and thus by fraud and false representations, obtained fifteen hundred dollars of the plaintiff's money. The plaintiff asks judgment for said sum and interest. The answer is a general denial.

The record states, that the plaintiff, to sustain the issues upon his part, adduced evidence tending to prove each and every averment of fact contained in his petition, and the defendant, upon his part, gave evidence tending to controvert such averments of fact, and that there was evidence tending to prove all the facts submitted in the several instructions to the jury.

There was judgment for the defendant, and the only error complained of is the misdirection of the jury by the court.

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At the instance of the plaintiff the court instructed the jury as follows:

"If you find from the evidence that, prior to the date of the paper read in evidence of January 11, 1884, the defendant verbally agreed with the plaintiff to act for the plaintiff in endeavoring to buy for the plaintiff a certain interest in the mines mentioned in evidence, and that the defendant represented to the plaintiff that such purchase would require twenty-five hundred dollars to obtain the interest of Noone, and did obtain of the plaintiff that sum for that purpose, and that the defendant in fact purchased said interest of said Noone for one thousand dollars, and did not account to the plaintiff for said difference, but caused the same to be conveyed to the plaintiff, and retained the said twenty-five hundred dollars, then your verdict should be for the plaintiff for the sum of fifteen hundred dollars."

At the instance of the defendant, the court gave, among others, the following instruction:

"2. The court instructs the jury that, if they believe and find from the evidence, that by the transaction in question, between the plaintiff and the defendant, the defendant sold and conveyed, or caused to be conveyed to the said plaintiff, a one-fourth interest in the mines referred to in the petition, for the sum of twenty-five hundred dollars, as set out in the written contract of January 11, 1884, and that the defendant did make, or cause to be made, by one Morris, a conveyance to the plaintiff of such interest, then, and in that case, the jury should find their verdict for the defendant, no matter what it cost the defendant to buy such interest from other parties."

The plaintiff complains that there is a direct conflict between these two instructions, and that the second does not limit the first, but contradicts it.

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This complaint is just. The first instruction tells the jury that if the defendant caused the property to be conveyed to the plaintiff for twenty-five hundred dollars, when in fact he purchased it for one thousand dollars, they should find for the plaintiff in the sum of fifteen hundred dollars. While the second tells the jury that they should find for the defendant under substantially the same facts.

The defendant contends that there is no conflict between these two instructions. That the instruction given on the part of the defendant is predicated upon a finding by the jury that the defendant acted solely by virtue of a written contract between the plaintiff and himself, as a principal and not as an agent; while the plaintiff's instruction is predicated upon a state of facts under which the defendant was constituted the plaintiff's agent by a verbal modification of the written instrument. If it was the design of the defendant to have the attention of the jury directed to the distinction above stated, then the language used in the second instruction was very inaptly chosen, because such language is far better designed to mislead than to aid the jury.

It is apparent that every one of the facts stated in the defendant's instruction may be found by the jury in favor of the defendant, without depriving him of the character and responsibility of an agent. The written instrument referred to in the instruction is not preserved in the record, but as the record finds that there was evidence tending to prove that the defendant agreed to act for the plaintiff in concluding this sale, we must assume that he may have done so, notwithstanding this writing. It is true the instruction used the words "sold and conveyed," but it uses them in the alternative with "caused to be conveyed." The difference between a state of facts which constitutes the defendant a principal in his dealings with the plaintiff, and one which constitutes him

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the plaintiff's agent, is very apparent when the facts pass in review before the cultured legal sense of the judge, but in order that the distinction may become intelligible to a jury, their attention should be drawn to it in unequivocal terms, which can not be misunderstood.

In this case the petition warranted no recovery, if the plaintiff and the defendant dealt with each other solely on the footing of principals. It failed to state that the defendant's fraudulent representations formed an inducement of the purchase, or that the plaintiff relied upon them, or that the property purchased was worth less than the price paid. The plaintiff's claim of recovery was based on the sole fact that the defendant, as his agent, obtained from him twenty-five hundred dollars for a certain purpose, and expended only one thousand dollars, leaving him accountable for the residue. As the jury was misinstructed on this issue, the judgment can not be permitted to stand.

The judgment is reversed and the cause remanded. All the judges concur.

Joseph Lindenschmidt, Respondent, v. Amadee Vallee, Appellant.

St. Louis Court of Appeals, December 7, 1886.

1. **Justices—Jurisdiction—Husband and Wife.—A judgment against a husband alone in an action before a justice, in a suit against a husband and wife on a debt contracted for necessaries, is not void for want of jurisdiction.**

2. **Debtor and Creditor—Collateral Security.—The taking of collateral security does not suspend the ction on the main debt unless it is so agreed.**

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3. APPELLATE PRACTICE—AFFIRMANCE WITH DAMAGES.—A judgment on a money debt admitted to be due will be affirmed with damages unless the appeal shows substantial merit.

APPEAL from the St. Louis Circuit Court, W. H. HORNER, Judge.

Affirmed with ten per cent damages.

H. M. WILCOX, for the appellant.

JOHN B. ROEDER, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This action was commenced before a justice of the peace to collect a merchant's account. The plaintiff's statement alleged the sale and delivery of the goods at various times, at the instance and request of the defendant, the value thereof, the settlement of a part of the indebtedness by the giving of a promissory note, and the amount remaining unpaid; and also alleged that the debt was created for necessaries for the defendant's wife and family, and prayed judgment, and also for a general and a special execution, under which the property of the defendant and that of the defendant's wife could be levied upon and sold. The justice, disregarding so much of the prayer of the statement as asked for a special execution, rendered judgment against the defendant for the amount claimed. From this judgment the defendant appealed to the circuit court. Upon a trial *de novo* in the circuit court before the judge sitting as a jury, a general judgment was again rendered against the defendant for a like amount, from which the defendant has appealed to this court.

I. The first point is that the petition stated a case of which the justice had no jurisdiction, because a suit to charge the separate property of a married woman is a suit in equity, of which justices of the peace have no

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cognizance. There is nothing in the point. So much of the statement as contained a prayer for a special execution against the property of the defendant's wife, the property not being described and she not being a party, may well have been rejected as surplusage, as was done by the justice and also by the circuit court. The same may be said of the allegation that the articles were necessaries for the defendant's wife and family. So rejecting this averment and prayer, the petition stated a good demand at law, of which the justice had cognizance.

II. It is next objected that the court erred in compelling the defendant's counsel to admit the fact of the sale and delivery of the goods, upon the threat that unless he did so the court would send the case to a referee. This point is equally barren. The account which accompanied the statement contained a great many items, and was a "long account" within the meaning of the statute. Sect. 3606, Rev Stat. The court was not obliged to try such an action if the correctness of the account was contested, and had the power under the statute, of its own motion, to send it to a referee. The court, therefore, properly told the defendant's counsel that this course would be taken, unless the account was admitted. This put the defendant under no duress or other coercion; the admission was entirely voluntary, and the fact that the defendant, through his counsel, saw fit, under the circumstances, to make it, will not support an exception.

III. Equally untenable is the point that the court erred in refusing the second declaration of law offered by the defendant. This contained the startling proposition that unless the plaintiff made out his case by *other* evidence than the above admission of the defendant, the court must find for the defendant.

IV. Some evidence was given that the defendant, prior to the commencement of the action, placed in the hands of the plaintiff some shares of corporate stock, as collateral security for this debt, upon a written agree-

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ment that, unless the debt should be paid in one week, the stock should become the property of the plaintiff. The evidence tended to show a subsequent waiver by the plaintiff of his right of forfeiture thus conferred; and the court gave, with reference to the evidence touching this transaction, the instruction which the defendant requested. There was no evidence tending to show that the plaintiff took the stock as absolute payment, or that he had elected to forfeit it and make it his property under the contract. A creditor having collateral security for his debt is not confined to his security nor precluded, by the fact of holding it, from bringing a direct action against his debtor. There is, therefore, nothing in this branch of the case which affords any ground of exception.

V. The action of the court in allowing the plaintiff, after both parties had rested, to put in evidence certain letters of the defendant, and also a letter of the defendant's counsel, to the plaintiff's attorney, was a ruling within the sound discretion of the court. There is nothing in the record to indicate that this discretion was abused, or that the defendant suffered any prejudice from it.

VI. We are asked, in affirming the judgment, to give ten per cent damages. This is an action by a retail grocer to collect a sum of money for groceries furnished to the defendant at various times during the year 1884. The goods are admitted to have been delivered; the defence of payment, which was set up, was manifestly a sham; the plaintiff has been kept out of his money for nearly two years by the fact of the defendant having contested the demand in three courts on untenable grounds. In such cases it has always been our practice to give damages in affirming the judgment, where they have been asked for. The appeal does not appear to us to have the least merit.

We accordingly affirm the judgment with ten per cent. damages. It is so ordered. All the judges concur.

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STATE OF MISSOURI TO THE USE OF J. H. VETTE, Appellant, v. J. B. SHEVLIN ET AL., Respondents.

St. Louis Court of Appeals, December 7, 1886.

1. LIENS—STABLE KEEPERS.—A stable keeper, under the statute, has a lien on the animal boarded by him so long as it remains the property of the owner who contracted the debt, or of his vendee with notice.

2. ——— When the animal has been permanently removed from the stable, with or without the stable keeper's consent, the lien is lost as to those who, in good faith and without notice, obtain an interest therein.

3. ——— EVIDENCE.—The evidence as to whether the horse was still boarding at the stable when it was mortgaged being conflicting, it is error to exclude evidence tending to show that the mortgagee acted in good faith and without notice.

APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Reversed and remanded.

MUENCH & CLINE, for the appellant: If possession of personalty, on which there is a lien, is temporarily parted with and another lien attaches meanwhile, the former does not revive against the latter. Schoul. Pers. Prop. 497; *Godin v. Lond. As. Co.*, 1 Burr. 489; *Spring v. Ins. Co.*, 8 Wheat. 268.

E. T. FARISH, for the respondent: As the result of the testimony went to show that the horse was taken from the stable on the pretext of being returned, and was not so returned, it might as well be contended that if the property was obtained by force or fraud, that such parting with possession would defeat the lien. *Bigelow v. Henton*, 4 Denio, 496.

THOMPSON, J., delivered the opinion of the court.

This case involves a conflict between a stable-keeper's lien and a chattel mortgage. The action is upon a bond given under the sheriff, marshal, and constable's act, under circumstances which will be hereafter stated.

The property in respect of which the controversy arose, a horse, wagon, and harness, belonging to one Albrecht, a retail butcher in St. Louis, who had the same boarded in the defendant's stable, using the same during the day in his business with the defendant's consent, just as all business men who have their horses boarded do. On the twenty-ninth of April, 1885, Albrecht made a chattel mortgage of this and other property to the relator to secure a loan of money, which mortgage was duly recorded. It does not appear that at the precise point of time when the mortgage was delivered, the horse was in the actual physical custody of the defendant. But there was substantial evidence to the effect that at that time the horse was boarded in the defendant's stable, and was used by Albrecht during the day in his business. Albrecht testified that he had, previous to that time, rented stable room of one Miller, and had removed the horse to Miller's stable; but the defendant introduced Miller's son who testified that, while Albrecht had, previous to that time, rented the stable room, he had not in fact brought the horse there until some time after the date at which the chattel mortgage was given. The relator also introduced Samuel Bartholomew, who testified that he was in the relator's employ at the time when the loan was made; that he went out to look at the property, and that he found the horse, wagon, and harness in front of Albrecht's shop. The defendant's evidence tended to show that Albrecht continued to use the horse, wagon, and harness as he had done before, boarding the horse in the defendant's stable, until the fifth of May, when he took them out as

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usual, ostensibly to use them in his business, and failed to return them, but took them to another stable. After demanding of Albrecht that he should either pay the bill, amounting to $20.70, as the defendant claimed, which was due for the boarding of the horse, or return the property, both of which Albrecht declined, the defendant brought an action of replevin for the property, and, the property having been levied upon by a constable under the writ of replevin, the relator in the present action filed a claim under the sheriff, marshal, and constable's act, claiming the property as his by virtue of the chattel mortgage, the conditions of the same having been broken. Thereupon the defendant elected to give bond as provided for in the statute, upon which being done the constable retained the property; and it was afterwards sold under an execution in the defendant's lien suit, and the defendant became the purchaser. The present action is brought upon the bond thus given.

The statute creating and defining the lien of stable keepers reads as follows: "Every person who shall keep, board, or train any horse, mule, or other animal, shall, for the amount due therefor, have a lien on such animal, and on any vehicle, harness, or equipment coming into his possession therewith; and no owner or claimant shall have the right to take any such property out of the custody of the person having such lien, except with his consent or on the payment of such debt; and such lien shall be valid against said property in the possession of any person receiving or purchasing it with notice of such claim." Rev. Stat., sect. 3196.

I. The relator put the question to the witness, Bartholomew, what, if any, information the relator had before making this loan in reference to any claim for board upon this property. This question the court refused to allow the witness to answer, and an exception was saved. We think that this ruling was erroneous. Some effect must be given to the concluding words of the

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statute, "And such lien shall be valid against said property in the possession of any person receiving or purchasing it with notice of such claim." We hold the statute to mean that if the stable keeper voluntarily and entirely parts with the possession of the horse, as by allowing it to be removed to another stable for board, he thereby loses his lien as against any person who may thereafter purchase or become the mortgagee of it without notice of his claim. If, therefore, Albrecht's testimony was true, that prior to the date of the making of the chattel mortgage in this case, he (Albrecht) had, with the consent of the defendant, removed the horse to Miller's stable, the relator had the right to show that he had no notice, at the time of making the mortgage, of the defendant's claim against Albrecht for the board of the horse.

II. The relator requested the court to instruct the jury as follows, which the court refused: "The court declares the law to be, that if it appear from the evidence that at the time when A. Albrecht gave to relator the notes and mortgage in evidence, and received from the relator the money thereon, the horse, wagon, and harness were, with the consent of the said Shevlin, in the possession of said Albrecht, and the relator had not then any notice of any claim of lien thereon by said Shevlin, then the finding herein must be in favor of relator."

We are of opinion that the court committed no error in refusing the instruction above set out. In the view we take of the meaning of the statute, the lien thereby conferred is not dependent upon an actual physical custody by the stable keeper at every moment of time. We think that the lien conferred by the statute subsists, even as against third persons without notice, while the horse is boarded in the stable of the lienor, although it may, with his consent, be used during the day by the owner in his business. To hold other-

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wise would be to construe the statute so as to deprive stable keepers of the protection which the legislature probably intended to give them; since, as is well known, in most cases where horses are boarded, the owner is allowed to use them in his business during the day. This being so, the statute could not have intended to allow the owner to destroy the lien of the stable keeper while having the possession of the horse on the street during the day, by selling or mortgaging it to a stranger without notice of the lien. On the contrary, we are of opinion that every person is bound so far to take notice of the statute, that, when he is about to become the purchaser or mortgagee of a horse found upon the street in the custody of its owner, it is incumbent upon him to make inquiry as to the place where the horse is boarded, and whether anything is due for its keeping. There is no greater hardship in this rule than there is in the general rule in respect of purchases of personal property, that the purchaser gets no better title than the seller has.

III. We are also of opinion that if the stable keeper voluntarily parts with the general custody of the horse before the amount due for the keeping of the horse is paid, as by allowing its owner to remove it to another stable for board, he thereby loses his lien, as against third persons having no notice of his claim. We are equally clear, in conformity with the views expressed by us in the case of *Heaps v. Jones* (*post*, p. 617), that where the possession of the horse is tortiously obtained from the stable keeper by the owner or by any one else, the lien of the stable keeper is not thereby destroyed, even as against third persons having no notice of his lien, and that he may in such case maintain replevin therefor. The case of *McCreery v. Muench* (7 Mo. App. 589), in so far as it conflicts with this view, is overruled. If, therefore, on another trial it should be found that prior to the delivery of the chattel mortgage

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in evidence, Albrecht had, with the consent of the defendant, removed the horse to another stable, and that the plaintiff had no notice of the defendant's lien, the verdict and judgment ought to go in favor of the plaintiff; but it should go in favor of the defendant if such removal was done fraudulently, or without the consent of the defendant, unless the defendant, after knowledge of the removal, by some distinct affirmative act, or by gross laches, waived his right of lien.

IV. We are also of opinion that the trial court erred in admitting in evidence, against the objection of the plaintiff, the record in the replevin suit between the defendant and Albrecht. This included the judgment, the special execution issued thereunder, and the sheriff's return thereon, showing the amount for which the horse was sold. The plaintiff in this action was not a party to that suit; so far as he is concerned it was *res inter alios acta.* The defendant in this proceeding is bound to establish his right of lien as against the plaintiff by independent evidence, and not by a record which is not binding on the plaintiff, a stranger to the same. This case was tried before a jury and it is plain that this record might have been prejudicial to the plaintiff, especially upon the question of damages, assuming that he should make a case entitling him to recover.

The judgment will, for these errors, be reversed and the cause remanded. It is so ordered, with the concurrence of all the judges.

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MARTHA E. BABB ET AL., Respondents, v. VICTOR BRUERE, Appellant.

St. Louis Court of Appeals, December 7, 1886.

1. **JURISDICTION DEFINED.—Jurisdiction is the power to hear and determine the particular cause, and where there is jurisdiction of the person and of the subject matter, the decision of all other matters properly arising in the case is but an exercise of that jurisdiction.**

2. **JUSTICES JUDGMENTS—IRREGULARITY—PRACTICE.—A justice's judgment which is irregular under the conceded facts may be modified by the circuit court, wherein the transcript is filed, so as to conform it to the law.**

3. **HUSBAND AND WIFE—ANTE-NUPTIAL DEBTS OF WIFE—HUSBAND'S LIMITED LIABILITY.—The husband, in an action for the debts of his wife *dum sola*, is liable only to a special judgment, which must be satisfied out of property which he acquired from his wife.**

4. **——— PRACTICE.—A general judgment by a justice against a husband for ante-nuptial debts of his wife is irregular, and the circuit court, wherein the transcript of the judgment is filed, should recall a general execution issued thereunder, and make the judgment and the execution conform to the law.**

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Reversed and remanded with directions.

LOUIS A. STEBER, for the appellant: The act of 1875, now section 3296, of the Revised Statutes, 1879, abrogated the common law liability of the husband for the ante-nuptial debts of the wife. *Howarth v. Warmser*, 58 Ill. 48; *Martin v. Robson*, 65 Ill. 129; s. c. 16 Am. Rep. 578; *Haight v. McVeagh*, 69 Ill. 627; *Biery v. Ziegler*, 93 Pa. St. 368; *Norris v. Corkill*, 32 Kansas 409. A personal judgment against a married woman, in such a case, would not be void, it being an exception to the general rule. *Walker v. Deaver*, 79 Mo. 681; *Gruen*

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v. Bamberger, 11 Mo. App. 261. The act of 1881, page 161, exempts the husband and the husband's property from the payment of the debts of the wife contracted before marriage. The method of procedure adopted in this case is correct. *Bauer v. Bauer*, 40 Mo. 61; *Bauer v. Miller*, 16 Mo. App. 257; *Bain v. Chrisman*, 27 Mo. 293; *Ex parte James & Ray*, 59 Mo. 280, 284.

M. KINEALY and JAS. R. KINEALY, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This was a motion to recall and set aside an execution issued out of the office of the clerk of the circuit court upon a transcript of a judgment of a justice of the peace therein filed. The ground of the motion is, that the transcript of the justice shows on its face that the judgment of the justice is void for want of jurisdiction. The ground on which this contention is based is that the statement, filed by the plaintiff in the suit before the justice of the peace, which the defendant was permitted to put in evidence before the circuit court, shows that the action was prosecuted against the defendant, without the joinder of his wife, for an ante-nuptial debt of the wife. It is contended that, upon such a statement a justice of the peace has no jurisdiction, because (1) the husband is not liable in this state for an ante-nuptial debt of his wife; and (2) if he is so liable, he can only be made so in an action in which the wife is joined with him as defendant. We do not consider it necessary, for the purposes of this case, to express any opinion upon the first of these propositions. The second we concede, so far as it was ruled by this court, in *Gruen v. Bamberger* (11 Mo. App. 261), where it was held that, in a suit against a husband for an ante-nuptial debt of the wife, if the wife is not joined as a party defendant, the judgment will be arrested on mo-

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tion or reversed on error. We shall then assume, for the purposes of this argument, but without conceding the first proposition, (1) that a husband is no longer liable in this state for an ante-nuptial debt of his wife, unless, for a consideration, he has agreed to become so; and (2) that in an action against a husband for an ante-nuptial debt of his wife, unless the wife is joined as a party defendant, the judgment will be arrested on motion or reversed on error.

I. But from these premises the conclusion by no means follows that the judgment of the justice is void for want of jurisdiction. The whole argument in support of the contention that the judgment is so void proceeds upon a misconception of the distinction between a want of jurisdiction and an erroneous exercise of jurisdiction. "Jurisdiction," says Mr. Justice Baldwin, "is the power to hear and determine the subject matter in controversy between the parties to a suit; to adjudicate or exercise any judicial power over them. The question is whether, on the case before the court, their action is judicial or extra-judicial, with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." *State of Rhode Island v. State of Massachusetts*, 12 Pet. (U. S.) 718. See, also, *Grignon's Lessee v. Astor*, 2 How. (U. S.) 338. "Jurisdiction," said the late Judge Rorer, "is defined to be the power to hear and determine the particular case involved." Rorer on Judicial Sales, sect. 59. This definition was quoted with approval by our supreme court in *Gray v. Bowles*, 74 Mo. 419, 423. In the case just cited the doctrine was thus stated by Norton, J.: "When there is jurisdiction of the person and subject matter, the decision of all other questions arising

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in the case is but an exercise of that jurisdiction, and an erroneous decision of any of these other questions could not impair the validity and binding force of the judgment when brought in collaterally." *Id.* 424. Upon the same question the supreme court of California said: "It is not the particular decision given which makes up jurisdiction, but it is the authority to decide the question at all. Otherwise all distinction between the erroneous exercise of jurisdiction on the one hand, and the total want of it on the other must be obliterated." *Chase v. Christianson*, 41 Cal. 253. This statement was likewise quoted with approval by our supreme court in *Gray v. Bowles, supra.* The following is the expression of the same doctrine by the supreme court of Ohio: "The court once by its process having acquired the power to adjudicate upon a person or thing, it has what is called jurisdiction. * * * The distinction is between a lack of power or want of jurisdiction in the court and a wrongful or defective execution of the power. In the first instance all acts of a court not having jurisdiction or power are void; in the latter, only voidable. A court may then act, first, without power or jurisdiction; second, having power or jurisdiction, may exercise it wrongfully; or, third, irregularly. In the first instance the act or judgment is void, and is as though it had not been done. The second is wrong and must be reversed upon error. The third is irregular and must be corrected on error." *Paine v. Moreland*, 15 Ohio, 435. This expression of doctrine was quoted with approval by our supreme court in *Freeman v. Thompson* (53 Mo. 183), and also in *Gray v. Bowles, supra.* The following statement of the same doctrine is from an approved text writer: "Before this power can be affirmed to exist, it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has been preferred, and

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that such person or thing has been properly brought before the court or tribunal to answer the charge therein contained. There can be no doubt that the filing of a petition or complaint, such as not to be deemed sufficient on demurrer, may confer jurisdiction. The power to decide upon the sufficiency of a cause of action as presented in the pleadings, like the power to decide any other legal proposition, though erroneously applied, is binding until corrected by some superior authority." Freeman on Judg., sect. 118. Many expressions and applications of the same doctrine will be found in decisions of our own and other courts. *Ellis v. Jones*, 51 Mo. 180, 186; *Jeffries v. Wright*, 51 Mo. 215; *Hardin v. Lee*, 51 Mo. 241; *Yeoman v. Younger*, 83 Mo. 424; *Bauer v. Miller*, 16 Mo. App. 252, 257; *Grignon's Lessee v. Astor*, 2 How. (U. S.) 333; *Ex parte Watkins*, 3 Pet.(U. S.) 193; *Ex parte Parks*, 93 U. S. 18; *The People v. Sturtevant*, 9 N. Y. 263, 287; *Ex parte Winston*, 9 Nevada, 71; *Re Callicot*, 8 Blatch. (U. S.) 89; *People v. Shea*, 3 Park Cr. (N. Y.) 562.

II. This principal applies to the judgments of courts of limited or special jurisdiction, as well as to the judgments of superior courts of record. This is shown by the Missouri cases above cited, all of which related to the judgments of inferior tribunals.

III. To this principle an exception, grounded upon one old decision (*Bushnell's case*, Vaughn, 135; s. c., How. St. Tr. 999; T. Jones, 13), and several modern ones (*The People ex rel. v. Liscomb*, 60 N. Y. 599; *The People v. Kelly*, 24 N. Y. 74, 77; *Ex parte Siebold*, 100 U. S. 371, 376; *Ex parte Clark*, 100 U. S. 399; *Ex parte Page*, 49 Mo. 291; *Ex parte Jilz*, 64 Mo. 205), has been admitted. This exception is that, where *in criminal prosecutions* the prisoner has been sentenced to a punishment not allowed by law, or in excess of that allowed by law, for the particular offence, the judgment is void in the sense that the prisoner may be released on

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habeas corpus; though now, by a recent statute in this state (1 Rev. Stat., sect. 1996), the office of the writ of *habeas corpus* has been so far changed into a writ of error, as to require the court or officer hearing the *habeas corpus* in such a case to re-sentence the prisoner in conformity with the law. Whether this principle extends so far as to sanction the collateral attack of judgments in civil cases, on the ground that they are in excess of the jurisdiction of the tribunal, we need not now consider. We may concede, for the purpose of the argument, that it does. We may concede, for instance, that if, in an action of this kind against a husband and wife, the justice had proceeded to render a special judgment subjecting the real estate of the wife, so much of his judgment would be void, because it would be an attempt to grant equitable relief, which a justice of the peace has no jurisdiction to do. We may also concede that if, in the case at bar, the justice had, instead of rendering a mere money judgment against the defendant, added thereto an order that his body be taken in execution, this part of his judgment would also be void for want of jurisdiction.

IV. Another exception to the general rule above stated is, that where the jurisdiction is conferred *by statute*, upon any tribunal of whatever grade, to be exercised in a *summary or special* manner, contrary to the course of the common law, which means contrary to the usual course of courts of general jurisdiction, whether of law or equity, the facts upon which the statute predicates the power to proceed must affirmatively appear upon the record of the court, or the proceeding will be deemed *coram non judice* and void. *Werz v. Werz*, 11 Mo. App. 26; *Creason v. Railroad*, 17 Mo. App. 111; *Vaughn v. Railroad*, 17 Mo. App. 4, and cases cited. It is needless to say that the action which culminated in the justice's judgment in this case was not within this exception, but was a mere action at law

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for a debt, in which the justice proceeds according to the course of the common law.

V. The defects complained of as showing the want of jurisdiction in the justice in this case are, (1) that the statement consists of a demand upon which the defendant is not liable in point of law; (2) that the justice ought not to have proceeded to judgment, because of the non-joinder of a necessay party defendant. We may concede, for the sake of argument, that, for the first of these defects if the action had been commenced in the circuit court the judgment would be arrested on motion, or reversed in this court on appeal or error. And we do concede, as this court held in *Gruen v. Bamberger* (11 Mo. App. 261), that, for the second of these defects had the cause been commenced in the circuit court, the same consequences would follow. But it has never been laid down in this state, in proceedings according to the course of the common law, that a judgment of the circuit court is void, in the sense that it may be collaterally assailed and set aside, merely because the petition fails to state a cause of action, so that the judgment might have been arrested on motion, or reversed on appeal or error. The jurisdiction of a superior court of record to proceed in such a case does not depend upon the filing of a petition which states a cause of action, because the power to decide whether the petition does state a cause of action rests in the court, and the power to decide is jurisdiction. We know of no reason for applying a different rule to proceedings before justices of the peace. If we were to concede the correctness of the views pressed upon us by the learned counsel for the appellant, it would drive us to the length of holding that wherever, in a case proceeding according to the common law, the judgment of a superior court of record might be arrested on motion or reversed on error, the judgment of a justice of the peace must be held void in a collateral proceeding for want of jurisdiction. Such a rule would enable a

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party defendant, against whom a just demand might be prosecuted before a justice of the peace, to lie by, whenever advised that the statement did not present a cause of action, and wait until judgment and execution, and then attack the error for the first time, by a motion to quash the execution, after the power to amend had passed out of the plaintiff. The law does not favor such unfair methods in the administration of justice. Where there is an entire want of power, either to render any judgment, or possibly to render the particular judgment, the defendant may rightfully ignore the proceeding, defend his possession, and move the court, as in this case, to recall and quash any process issued to enforce it. But where, as in this case, the justice has jurisdiction of the defendant and of the general subject matter, the defendant may not rightfully lie by, merely because the justice has attempted to exercise his objection for the first time, in the form of a motion to quash the execution, thus converting this motion into an appeal or writ of error.

VI. It remains, however, to consider the effect of the act of Morch 25, 1881 (Laws of 1881, page 161), exempting the individual property of the husband from the ante-nuptial debts of the wife, in connection with the decision of the supreme court in *Bauer v. Bauer* (40 Mo. 61), upon the rights of the appellant. This statute reads as follows; "The property owned by a man before his marriage, and that which he may acquire after his marriage, by purchase, descent, gift, grant, devise, or in any other manner whatsoever, and the profits thereof, except such as may be acquired from the wife, shall be exempt from all debts and liabilities contracted or incurred by his wife before their marriage." The effect of this statute is clearly to exempt all property of the husband from all liability for the ante-nuptial debts of his wife, except such property as the husband may have acquired from her. In the case of *Bauer v. Bauer* (*supra*), it is not very clear what the supreme court did

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intend to decide; but what it in fact did decide was, that where a judgment of a justice of the peace is void for want of jurisdiction, because rendered in a proceeding, the apparent object of which was to subject the separate estate of a married woman to the payment of her supposed debt, which is a proceeding in equity, and a transcript thereof is filed in the circuit court, it may be set aside by the court. But Holmes, J., in delivering the opinion of the court, said: "The judgment was irregular, if not absolutely void." This *dictum* of the court would go to the length of establishing the rule that where the transcript of a justice of the peace is filed in the circuit court, under the statute, the court may set aside the judgment entirely, if it appears to be irregular, thus leaving the plaintiff, if his claim is barred by limitation, wholly remediless. We are not prepared to follow the case to this extent. On the contrary, we decline to follow the decision beyond what it in fact decides, that in such a case the judgment of the justice may be wholly set aside, where it is void for want of jurisdiction. That, as we have seen, is not the case here. But in view of the statute, it is entirely clear that the judgment was erroneous, and erroneous in the sense of being unlawful; that is, rendered in a case in which a general judgment, such as it was, is not allowed by law. We think, that in such a case the power given to the circuit court in section 2999, Revised Statutes, as construed in *Bauer v. Bauer* (*supra*), is large enough to enable the court so to modify the judgment as to make it conform to the law, and we accordingly reverse the judgment and remand the cause to the circuit court with directions to recall and quash the execution, and, if the plaintiff shall so elect, to modify the judgment of the justice by an order of record, so as to allow the plaintiff to have execution thereon against such property only as the defendant may have acquired from his wife, as prescribed by the act of 1881. The sheriff, before making

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any levy under the execution, will necessarily have to determine that the defendant has property acquired from his wife, by such evidence as he may be able to obtain.

It is so ordered. All the judges concur.

JOHN HENSGEN, EXECUTOR, Appellant, v. J. P. MULLALLY, Respondent.

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St. Louis Court of Appeals, December 21, 1886.

1. EVIDENCE—BOOKS.—Book entries are not evidence in favor of the party making them, and the party's death does not change the rule.

2. ——— This rule is not changed by the statute which makes parties competent to testify in their own behalf.

APPEAL from the St. Louis Circuit Court, GEORGE W. LUBKE, Judge.

Affirmed.

I. D. FOULON, for the appellant.

J. P. VASTINE, for the respondent.

LEWIS, P. J., delivered the opinion of the court.

The plaintiff sues as executor of John Hensgen deceased, on an open account made by the defendant with the testator, during his lifetime, for work and materials delivered, chiefly in repairing and re-furnishing vehicles. The cause was sent to a referee, who found and reported in favor of the defendant, on the ground that the only testimony offered by the plaintiff was in-

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admissible for the purpose of proving the account. The referee, in his report, says that the plaintiff "introduced evidence tending to establish the authenticity of certain books of account of his testator, in which books of account are contained the items of work, service, and labor constituting the subject matter of his action. The evidence satisfactorily established the proposition that the books produced were the regular books of account of the plaintiff's testator, and that the entries therein were made at or about the time of the various transactions therein recorded. The evidence also established the fact that all of said entries in said books were made by the plaintiff's testator in person, and not by a book-keeper or clerk." The referee sustained the defendant's objection to this evidence, as incompetent to prove the account, and was in turn sustained by the circuit court.

The principles of the common law excluded a plaintiff's book entries as evidence against the other party, apparently on the ground that one could not be permitted to make evidence in his own favor. The English courts, however, long ago recognized the admissibility of such testimony, where the entries were against the interest of the party making them. *Higham v. Ridgway*, 1 East, 109. Among the American courts there has been a considerable diversity of opinion upon the admissibility of book-entries to prove the facts therein stated, whether for or against the interest of the party making them. But in Missouri, the rule has long been settled, that a party can not introduce his book entries for the purpose of establishing the correctness of his account. In *Hissrick v. McPherson* (20 Mo. 310), the subject was fully considered by Judge Scott, who demonstrated, not only that such evidence had never been recognized as admissible in this state, but that to do so would be, as he shows by several illustrations, directly hostile to the policy of our jurisprudence. The learned counsel for the appellant in this case argues with much ingenuity that

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the change in our statute, which now permits a party to testify in his own behalf, has reversed the rule of that decision. We do not perceive that the premises sustain the conclusion. The law which admits that a party may testify truly in his own interest, leaving his credibility to be determined by the jury, certainly adds nothing to the credibility of his voluntary statements made out of court, and without the sanction of an oath; and his book entries amount to nothing more. This court held, in *Daum v. Neumeister* (2 Mo. App. 597), that the change in the law referred to made no difference in the rule excluding book accounts as evidence. The rule of *Hissrick v. McPherson*, has been adhered to in a number of decisions since the change made in the statute. *Lord v. Siegel*, 5 Mo. App. 582; *Hanson v. Jones*, 20 Mo. 595; *Anderson v. Volmer*, 83 Mo. 403; *Daum v. Neumeister*, 2 Mo. App. 597; *Cozzens v. Barrett*, 23 Mo. 544.

The appellant insists that the death of the testator, whose book entries were offered in evidence, makes this a different case from any that have heretofore been decided in Missouri; that, since it is impossible to produce the primary testimony of the testator, who made the entries, the law will admit, as secondary evidence, and the next best that can be procured, the books themselves, with the suppletory proofs of their authenticity, of the times when the entries were made, and of the testator's habitual accuracy in keeping his accounts. This position mistakes the nature of both primary and secondary evidence, as adapted to the issue here presented. The fact to be proved is, not that the several items were charged on the books against the defendant, but that the articles were furnished and the work done by the testator for the defendant, with the mutual understanding that the defendant was to pay therefor the prices charged. The primary and best evidence to prove these facts is not necessarily the testimony of

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the man who furnished the articles and the work. Any competent witness, who was personally cognizant of the facts, could make the proof of them quite as well, and the rule which demands the best evidence would be satisfied by the testimony of any such witness. The loss by death or absence of one witness who might prove a particular fact, affords no ground for the introduction of secondary evidence, where the fact is of such a nature that it be may proved with equal conclusiveness by other means. It is only where the subject of proof is such that all the best evidence of the fact is beyond reach, that the door will be opened for the admission of an inferior grade of proof. Thus, if the contents of a deed are to be established, the best, and the only best evidence thereof will appear in the production of the deed itself. If the deed be lost or destroyed, then, inasmuch as there can not be, in the nature of things, any existing evidence of equal grade with the deed itself, secondary evidence may be introduced in the shape of an authenticated copy. So, as to the proof of a last will. The law requires, first of all, the testimony of the attesting witnesses, and this testimony becomes, therefore, the best, and the only possible best evidence of the facts to be proved. If the attesting witnesses be dead, no testimony of equal grade with theirs is possible of attainment, and for that reason proof may be made of their hand writings. No such conditions of exclusively "best evidence" upon an issue like the one contained in this record, can be imputed to the personal testimony of one who has made entries in a book of accounts, touching the matter of controversy.

Nor can it be said that the books themselves, with the suppletory proofs, would, after the death of the person who made the entries in them, be in any sense secondary evidence upon the issues in this case. By Missouri law, they are not evidence of any sort for the purpose supposed. If the claimant, being alive, were

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permitted by law to prove his demand by his book entries, there might be some reason in holding that, in the event of his death, the books themselves, with the proper suppletory proofs, would be admissible as secondary evidence. But, as the testimony would be inadmissible with the sworn endorsement of the living claimant, it is impossible to see how it could be received without that endorsement, after his death. *Briggs v. Henderson* (49 Mo. 531), cited for the appellant, involved questions of copies and records of lost deeds, with their proper authentication, of which the originals would have been admissible in evidence, and is not in point.

We think the ruling of the referee and of the circuit court was correct, and the judgment will be affirmed. All the judges concur.

W. W. HEAPS, Respondent, v. G. W. JONES, Appellant.

St. Louis Court of Appeals, December 21, 1886.

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1. LIENS—LIVERY STABLE KEEPERS.—A livery stable keeper's lien for keeping a horse does not depend upon his possession of the animal, but he retains, to the extent of his lien, a special property in the horse wrongfully removed from the stable, while it remains in the possession of the owner, or of one claiming under him with notice of the lien.

2. ——— REMEDIES—REPLEVIN.—The statute (sect. 3197, Rev. Stat.) does not furnish the exclusive remedy where a horse upon which there is a stable keeper's lien has been wrongfully removed from the stable, but the lienor may enforce his rights in the horse by replevin.

3. IMPLIED CONTRACTS.—The law implies a contract on the part of the owner to pay for the keeping of an animal while it is detained under valid legal process.

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APPEAL from the St. Louis Circuit Court, AMOS M. THAYER, Judge.

Affirmed.

CHAS. F. JOY, for the appellant: "The law never implies what the parties never intended; never raises a promise in such circumstances." *Bank v. Aul*, 80 Mo. 200; *Morris v. Barnes*, 35 Mo. 412; *Hurt v. Hurt*, 41 Mo. 441. "When services are rendered and received without any expectation of payment no claim can be preferred therefor." *Morris v. Barnes*, 35 Mo. 412. "If one claims a lien on a horse for board, and the horse is not in his possession, he can not obtain possession by action of replevin." *McCreery v. Muench*, 7 Mo. App. 589.

WM. S. BODLEY, with whom is F. A. WIND, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

The parties submitted this cause to the trial court on the following agreed statement of fact:

"The plaintiff is, and from June 29, 1885, up to the time of bringing this suit was, a livery and boarding stable keeper in the district of the justice of the peace wherein this case is brought. On June 29, 1885, the defendant left the horse described in the complaint at the plaintiff's stable for keep and board. On August 5, 1885, the defendant took his horse from the stable for temporary use, and without the plaintiff's consent and without notice to the plaintiff refused to return the horse. On August 10, 1885, the plaintiff recovered the horse by a suit in replevin, and afterwards on the same day commenced a proceeding to enforce a stableman's lien on said horse for his keep from June 29, to August 5, 1885. The plaintiff was successful in both

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these proceedings before Justice O'Connel. The defendant appealed the replevin suit to the circuit court, where on December 11, 1835, the judgment of the justice in said cause was affirmed for failure to give notice of appeal. After advertisement under execution in the lien suit the defendant, on the thirteenth day of August, 1885, paid to the constable the amount of the first lien claim and costs. The defendant did not demand the horse from either the plaintiff or the constable, and when the constable told the defendant he might go and take the horse on August 13, said that the horse was being well fed and cared for, and that he would make the plaintiff pay well for taking the horse under the replevin suit. The horse remained in the stable of the plaintiff from the eleventh day of September, 1885, where it was fed and taken care of until the twenty-fifth day of December, 1885. On December 12, 1885, the plaintiff demanded of the defendant payment of the bill for keeping the horse as per account filed in this cause. After the defendant took the appeal in this cause, he, for the first time, demanded possession of the horse from the plaintiff and it was delivered to him. That the charges made in the bill filed are reasonable and fair for keeping and boarding the horse."

The charges made in the bill filed are $56.40, and the court on the above agreed statement of facts rendered judgment for the plaintiff for that amount.

The defendant appealing assigns for error that the judgment of the court is against the law, and makes the following points:

"1. A livery stable keeper is not entitled to a statutory lien for the keeping of a horse where he has obtained possession of the horse and holds it under, and by virtue of writ and judgment in replevin."

"2. The right to possession in the respondent, as determined by the judgment in replevin of December 8, carried with it the right to use, and either the right

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of possession against the owner, or the right to use destroys the right to a lien or charge for board or care."

"3. The basis of a livery stable keeper's right to a lien, and even his right to charge for the keep of a horse is based upon contract, expressed or implied. There was no express contract in this case, and no contract would arise by implication of law."

In order to dispose of these points intelligently it becomes necessary to determine the nature and extent of the statutory lien of a livery stable keeper, and the remedies which he may lawfully resort to in enforcing it. We do this more fully than the exigencies of the case before us necessarily demand, because it is of importance that questions of daily occurrence should be definitely settled as soon as brought to the attention of appellate courts.

The first section of the statute on the subject provides: "Every person who shall keep, board, or train any horse, mule, or other animal, shall, for the amount due therefor, have a lien on such animal, and on any vehicle, harness, or equipment, coming into his possession therewith, and no owner or claimant shall have the right to take any such property out of the custody of the person having such lien, except with his consent, or on the payment of such debt, and such lien shall be valid against said property in the possession of any person receiving or purchasing it with notice of such lien."

The statute in its present form is a re-enactment of the statute of March 27, 1875 (Laws 1875, p. 85), which contained a proviso referring to cases where the use of the horse was reserved to the owner or claimant, and was taken by him from the custody of the person keeping or boarding the same. The proviso made the lien as effectual in case of such removal, as if the property had not been removed. The practical inconvenience, and apparent injustice of enforcing this proviso, against purchasers and subsequent lienors in good faith, prob-

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ably led the legislature to omit it in the re-enactment of the statute, and to insert in lieu thereof the last clause of the section as it now stands, making the lien valid against the property in possession of any person receiving or purchasing it with notice of such lien.

The second section of the present statute provides how this lien may be enforced. A perusal of this section, however, will show that it provides for a proceeding *in rem*, the essential requisite of which is that the thing itself should be within the jurisdiction of the court. When the thing has been removed beyond such jurisdiction, the remedy thus provided necessarily fails. There is nothing in this section which leads to the conclusion, that it intended to deprive the lienor of other remedies. The fact that the statute provides one remedy does not preclude the parties from pursuing other remedies which they may have at common law. *Belkin v. Hill*, 58 Mo. 492.

Now in the case under consideration the statute provides, not only for the lien, but also, that "no owner or claimant shall have the right to take away any such property out of the custody of the person having such lien, except with his consent, and on the payment of such debt." Thus it expressly provides that the person boarding the horse shall have a special property therein to the amount due for such board, and that the taking away of the horse without payment of such debt, against the consent of the keeper, shall be wrongful. The keeper is thus invested with a special property and the right of possession as against the general owner, and these two elements entitle him to maintain an action of replevin.

The case of *McCreery v. Muench* (7 Mo. App. 589), as far as it necessarily conflicts with the views herein expressed, is overruled.

Under the equitable rule established in actions of replevin by *Dilworth v. McKelvy* (30 Mo. 149), and *Boutell v. Warne* (62 Mo. 350), there is no reason why a

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complete and satisfactory adjustment of the rights of the parties can not be made, even under this statute in that form of proceeding. This court has held that where a mortgagee in a chattel mortgage brings replevin against the mortgageor or a subsequent mortgagee, and the defendant tenders with his answer the amount due on the plaintiff's mortgage, the judgment should be for the return of the property to the defendant, upon his paying all the costs. *Williamson v. Gottschalk*, 1 Mo. App. 425. Thus in the case at bar if the defendant desired to avoid all costs of subsequent litigation, all he had to do was to tender the amount due for the keep of the horse, and costs in the replevin suit, and the property would then have been delivered to him.

He failed to do so although he admits that the debt was justly due. He left no other recourse to the plaintiff than to proceed under the statute to foreclose his lien. The plaintiff never claimed the horse as his own. There is no evidence in the case that he ever exercised the right of a general owner over it. He only claimed the special property therein which the law gave him. When that special property ceased he informed the defendant that he might take the horse, but the defendant refused to take it stating that it was well taken care of where it was.

Finding as we do, that the horse was lawfully in possession of the plaintiff during the entire time, with the defendant's knowledge and after a certain time with the defendant's consent, because he refused to take it away although at liberty to do so, we must find that the trial court was justified in deciding that the law implied a promise on the part of the defendant to pay for the keep of the horse.

The judgment is affirmed. All the judges concur.

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THE STATE EX REL. THE MISSOURI PACIFIC RAILROAD COMPANY, Petitioner, v. ABRAHAM J. SEAY, JUDGE, ET AL., Respondents.

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St. Louis Court of Appeals, December 21, 1886.

1. **PROHIBITION—PARTIES.—The state is not a necessary party to a writ of prohibition, though the writ may be prosecuted in the name of the state.**

2. **——— JURISDICTION.—The original jurisdiction of the St. Louis Court of Appeals is not limited by the constitutional provisions relating to its appellate jurisdiction.**

3. **——— Its jurisdiction to issue a writ of prohibition is, within its territorial limits, concurrent, and its powers co-extensive with the jurisdiction and powers of the supreme court.**

4. **——— The writ of prohibition is not one of right, and the fact that its issuance may, by arresting the further progress of a cause, deprive the supreme court of its exclusive appellate jurisdiction in a given case, will be considered by the court of appeals in determining whether it will issue the writ.**

5. **——— Where the jurisdiction of a court depends upon the findings as to contested facts, the decision of such facts, for the purpose of determining the question of jurisdiction, is, *prima facie*, a proper exercise of judicial power, and unless the remedy, by appeal, of the party aggrieved, is wholly inadequate, and the facts call for immediate relief, appellate courts should not issue a writ of prohibition to arrest further action in the cause.**

APPLICATION for a writ of prohibition.

Writ denied.

THOMAS J. PORTIS and CREWS & BOOTH, for the petitioner: This court has jurisdiction. *In re McDonald*, 19 Mo. App. 532. The trial court had no jurisdiction to act in that case, and its appointment of commissioners was *coram non judice*. See Laws of Kansas; Charter of the St. L., K. C. & Col. R. R. Co.; 1 Rev. Stat. of Mo. 1879,

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sect. 790; Session Acts of Mo., 1881, amending sect. 790, p. 75. "A writ of prohibition issues from a higher to a lower court which is exceeding its jurisdiction, and commands the judge of such court, and the parties to the action, to cease from prosecuting the same on the ground that the lower court has no jurisdiction." Green & Meyer's Mo. Pr. & Pl. 456, 529; Bull's Nisi Prius, 219; 2 Chitty's Practice, 355; *Thomas v. Mead*, 36 Mo. 248; *Trainer, etc., v. Porter, Judge*, 45 Mo. 336; *Casby v. Thompson*, 42 Mo. 133; *Vitt v. Owens*, 42 Mo. 512; *The State ex rel. West v. Clarke County*, 41 Mo. 44; *Howard v. Pearce*, 38 Mo. 296. "The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but is also extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject matter in controversy, has exceeded its legitimate powers." High's Extra. Rem., sect. 781, p. 623; *Quimbo Appo v. People*, 20 N. Y. 531; *The State v. Lewis*, 76 Mo. 370; *Att'y Gen'l v. Railroad*, 36 Wis. 489; *The State v. Laughlin*, 7 Mo. App. 530; *Railroad v. Commissioners*, 127Mass. 50; *Henshaw v. Cotton*, 127 Mass. 60.

NOBLE & ORRICK, for the respondents: Prohibition issues only from the court having appellate jurisdiction. High on Extra. Remedies; *Ex parte Gordon*, 1 Black. 503; *Ex parte Warmouth*, 17 Wallace, 64. When the supreme court has jurisdiction it is exclusive. Const. of of Mo., Amendm't 1883; Resolution of Gen'l Assembly, approved March 29, 1883; Laws 1883, sect. 5, pp. 215-216. An appeal or writ of error will lie, and all questions of power or public use, or endeavor to agree, can then be tried. *Railroad v. Evans & Howard Fire Brick Co.*, 85 Mo. 23, and cases cited. When there is other remedy, prohibition will not lie. *Wilson v. Berkstresser*, 45 Mo. 383, and other authorities in High on Extraor-

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dinary Remedies; *The State ex rel. v. Lubke*, 85 Mo. 338; *The State ex rel. Morse v. Burckhartt*, 87 Mo. 533.

ROMBAUER, J., delivered the opinion of the court.

The Missouri Pacific Railway Company, as relator, in the name of the state of Missouri, applied for a writ of prohibition against Seay, Judge of the circuit court of Franklin county; the St. Louis, Kansas City & Colorado Railroad Company, a foreign corporation, and O'Shea, Gentry, and Fisher, commissioners appointed by the Franklin county circuit court, to ascertain the points and manner of the crossing of the relator's railroad by the proposed railroad of the defendant company, and to assess the damages, if any, arising to the relator by the location, construction, maintenance, and operation of such crossing.

The relator's petition states, that the defendant company applied to the Franklin county circuit court, for the appointment of commissioners for the above purpose. That the relator appeared and filed written objections to such appointment, which being overruled it applied for an injunction to the judge in chambers, to restrain the further prosecution of such condemnation proceedings, which was also denied, and that the commissioners appointed, unless prohibited by the writ prayed for in this proceeding, would proceed to act in the premises.

The writ is prayed for on the ground that the defendant company is attempting to usurp the powers of a domestic corporation; that it is not authorized to exercise such powers either by the laws of the state of its creation, or by the laws of this state; that it has not complied with the provisions of its own charter by constructing, maintaining, and operating its lines of railroad in the state of Kansas to the boundary line of Missouri, or elsewhere, but began the construction of a

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railroad in the counties of St. Louis and Franklin, in the state of Missouri, on the extreme eastern side of this state, and several hundred miles from the boundary in the state of Kansas. The petition of the relator further states that unless these condemnation proceedings are prohibited by the order of this court, it will suffer irreparable injury, and that it has no remedy adequate in the premises, save the interposition of this court by the writ prayed for.

The petition was presented on the twelfth of October last, and an *ex parte* hearing had thereon, neither of the defendants being represented. The necessity of immediate action was strongly urged upon the court, and we made an order on that day upon all the defendants, citing them to show cause why the writ, as prayed for, should not be granted.[1] This order was served on Judge Seay and the commissioners the succeeding day, and the defendant company entered its voluntary appearance before the return day thereof.

Subsequently, in due time, the defendants appeared and showed cause by return. The return of Judge Seay states, in substance, that by the petition presented to him by the defendant company, and its appearance thereto by the relator, it sufficiently appeared that the Franklin county circuit court had jurisdiction in the premises, both over the subject matter and the parties, and that he overruled the relator's objections to the defendant's petition, after due consideration, and if he committed any error therein, the relator had its remedy by appeal, or writ of error. That, as he is advised, the defendant commissioners had performed the duty assigned to them, and filed their report prior to the relator's application for a writ of prohibition, and that subsequently the relator filed in the Franklin circuit court, exceptions to said report, which are still pending and undetermined.

The defendant commissioners made return to the

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order, in which they state, among other things, that they were appointed commissioners, as stated in the petition, on the ninth day of October, 1886, and pursuant to such appointment duly qualified, and that on the twelfth day of October, 1886, they filed their report in the clerk's office of the Franklin county circuit court, by which report they fixed the manner and location of the crossing of the relator's railroad, by the road of the defendant company, and the damages arising to the relator therefrom. That the crossing thus fixed is an overhead crossing, spanning the entire right of way of the relator's railroad, the abutments of such crossing being located on the right of way of the defendant company.

The defendant company also filed its return, in which it denies, under the oath of its president, the facts stated in the relator's petition, as far as they relate to a non-compliance on its part with the provisions of its own charter, and denies that it has not constructed, maintained, or operated its line of railroad, or any railroad in the state of Kansas to the boundary line of Missouri. It avers, that it has built its road in a large part in the state of Kansas, and to the boundary line thereof, and has extended its road as a complete railroad from the state of Kansas into the state of Missouri, and is building the part of the road where it crossed the relator's road as a part of the entire road, and that such road will be built in good faith and without delay.

The return further states the application for an injunction on the part of the relator before Judge Seay, which application raised the same questions as are raised here. Also that the commissioners had performed their duty, and filed their report before the application for this writ was made, and before they or the defendant company had any notice that such application would be made.

The relator demurred to the return of Judge Seay and to that of the defendant company, and took issue on

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the commissioners' return by reply. As the defendant company's return, however, states all the facts of any importance, in the same manner and to the same effect as the return of the commissioners, the case may be treated as if all returns had been demurred to raising the naked question, whether the returns show cause sufficient for denying the writ.

The questions presented by the returns have been fully and ably argued, orally and by briefs, and the arguments made cover a wide range. We do not intend to discuss all the points made on the argument in detail, but shall confine ourselves to such as must necessarily control our decision.

The objection that this proceeding should have been instituted by the state's attorney, and can not be prosecuted at the relation of a private person or corporation, is not tenable. The proceeding, it would seem, may be in the name of the state. *The State ex rel. v. Clark Co.*, 41 Mo. 44; *The State ex rel. v. Burckhartt*, 87 Mo. 533. But even that is not necessary, as the supreme court has frequently granted the writ upon application of individuals on their own behalf, without making the complaint run in the name of the state. *Thomas v. Mead*, 36 Mo. 247; *Howard v. Pierce*, 38 Mo. 293; *Vitt v. Owens*, 42 Mo. 512; *Trainer v. Porter*, 45 Mo. 336.

Nor have we any doubt as to the jurisdiction of this court in the premises. The mere fact that the controversy may, or even does involve questions of which the supreme court has exclusive appellate jurisdiction, does not oust this court of its original jurisdiction. Upon writs which this court issues in the exercise of its original jurisdiction, that jurisdiction, within its territorial limits, is the same as that of the supreme court. Const. of Mo., art. 6, sect. 12. The constitutional amendment of 1883 (Laws 1883, sect. 5, pp. 215, 216), relates to the appellate jurisdiction of this court only. Both the

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Kansas City Court of Appeals and this court, have had occasion to point out that distinction, and the question, under the language of the constitution, is free from doubt. *In re McDonald*, 19 Mo. App. 370; *Ex parte Boenninghausen*, 21 Mo. App. 270.

But while our power is clear, the question whether we ought, or whether we ought not, to exercise it in any given case, is a different one, and it may well be argued, that this court ought not to exercise the power except in cases where the exigencies of the particular case make the exercise of the power an imperative duty in order to prevent the miscarriage of justice, because in exercising the power, and prohibiting the lower court from proceeding in a cause, it may deprive the supreme court of its appellate jurisdiction in that cause.

The writ of prohibition is not, like the writ of *habeas corpus*, a writ of right. It is a writ, the award of which is to be governed by the discretion of the court applied to the facts presented by the individual case. It should never be granted against an inferior tribunal, except in cases where the usurpation of jurisdiction by that tribunal is clear. In *Thomas v. Mead* (*supra*), the first precedent for issuing the writ in this state, the court said: "In a case like this, without example in the history of the state, involving matters of the highest moment in the government, important for the honor and dignity of the judiciary, and essential to the peace and order of society, and in which the law is clear and the jurisdiction certain, we can not hesitate to make the first precedent." In *Vitt v. Owens* (*supra*), where the circuit court attempted, by injunction, to restrain the county court on a subject placed by law within the exclusive jurisdiction of the county court, the supreme court granted the writ on the ground that the injunction issued was not a mere transgression of jurisdiction, but an exercise of judicial authority where none existed. It has also been held in other jurisdictions that though the court has the power

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to issue the writ, it should never exercise it except in a very clear case calling for an immediate remedy. *The State v. Allen*, 2 Ired. 183.

The circuit court has power to hear and determine petitions in condemnation proceedings, and while that jurisdiction is statutory and limited, the law provides ample means to prevent its erroneous exercise, as it is settled that appeals lie from its judgments in such proceedings. *Railroad v. Lackland*, 25 Mo. 527; *Hannibal Bridge Co. v. Schaubacker*, 49 Mo. 555; *Ring v. Miss. Bridge Co.*, 57 Mo. 496; *Railroad v. Campbell*, 62 Mo. 585; *Railroad v. Brick Co.*, 85 Mo. 307. That a foreign corporation may avail itself of the right of condemnation conferred on domestic corporations, is provided by statute. Rev. Stat. 1879, sect. 790; *Gray v. Railroad*, 81 Mo. 136. In this case, therefore, the main facts tending to establish the jurisdiction, are matters of statute law. It is true that other facts, resting *in pais*, and determining the jurisdiction of the trial court, are alleged in the petition, but the truth of the petition in that regard is controverted by a return under oath, and that fact of itself was held sufficient for denying the writ in one instance. *The State v. Allen*, 2 Ired. 191.

To determine, in the first instance, its own jurisdiction, as far as the same rests upon contested facts, is a legitimate exercise of the judicial powers of any tribunal, and though it may err in such determination, its so doing is not a usurpation of judicial authority, but error, for which the proper remedy of the party aggrieved is by appeal. It must be an extraordinary case indeed, and one calling for immediate relief, which will justify an appellate tribunal to try a jurisdiction depending on contested facts, by prohibition.

It is settled that *mandamus* does not lie, where the party aggrieved has a remedy by appeal. *The State ex rel. v. Lubke*, 85 Mo. 338. By parity of reason-

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ing prohibition, which is but a negative *mandamus*, should not lie, unless, at least, the case presents features clearly indicative of the fact that the remedy by appeal is wholly inadequate.

No such facts appear in this case. The trespass upon the relator's property (assuming that it is a trespass), is, at most, a constructive one. The erection of an elevated roadway, which does not touch the ground of the relator's right of way, and which is of sufficient height above the defendant's road so as not to interfere in any manner with its maintenance and operation, or the traffic thereon, can not possibly be an irreparable injury to the relator. This is a palpable physical fact of which we are bound to take notice. The continuance of this mischief during the pendency of the condemnation proceeding, and until the determination of an appeal thereon, can in no view of the facts be so ruinous to the relator as to call for immediate relief, and to justify this court in interfering in the relator's behalf by the extraordinary writ of prohibition.

All these considerations lead us to overrule the relator's demurrers to the returns, and to deny the writ. All the judges concurring, it is so ordered.

ISAAC NEWBERGER, Respondent, v. S. M. FRIEDE, Appellant.

St. Louis Court of Appeals, December 21, 1886.

1. **JURISDICTION—JUSTICES—PARTNERSHIP.—A justice of the peace has no jurisdiction of an action by one partner against his co-partner in respect of partnership matters prior to a settlement between them.**

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2. PARTNERSHIP—NECESSARY CONSTITUENTS.—Mere participation in profits and losses does not necessarily create a partnership; but there must be such a community of interest as enables each party to make contracts, incur liabilities, manage the business, and dispose of the whole property.

3. PRACTICE—AMENDMENT—APPEAL.—An amendment, on appeal from a justice, changing the action from one on an open account to one on an account stated, does not change the cause of action.

4. ——— IMMATERIAL ERRORS.—If, upon the undisputed evidence, the plaintiff is entitled to the judgment rendered, errors in the giving or refusal of instructions is not ground for reversing the judgment.

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Affirmed.

JAMES CARR, for the appellant: A justice has no jurisdiction of actions involving unsettled partnership accounts. *Smith v. Smith*, 33 Mo. 557; *Bond v. Bemis*, 55 Mo. 524. The amendment changed the cause of action, and was, therefore, improper. Rev. Stat., sects. 3058, 3060; *Webb v. Sweedie*, 30 Mo. 488; *Freimuth v. Rupp*, 8 Mo. App. 387; *Harris v. Railroad*, 37 Mo. 307; *Waldhier v. Railroad*, 71 Mo. 514. It is not essential that there should be a community of interest in the capital stock in order to constitute a partnership. Story on Partnership, sect. 27; *Lengle v. Smith*, 38 Mo. 276; *Myers v. Field*, 37 Mo. 434.

EDWARD J. O'BRIEN, for the respondent: The mere participation in profit and loss does not necessarily constitute a partnership. *Donnell v. Harshe*, 67 Mo. 170; *The State ex rel. v. Finn*, 2 Mo. App. 548–9; *Musser v. Brink*, 68 Mo. 242. There must be a community of interest in the business. *Campbell v. Dent*, 54 Mo. 325; *Wiggins v. Graham*, 51 Mo. 17; *Ashby v. Shaw*, 82 Mo. 76; *Dwinel v. Stone*, 50 Me. 384.

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THOMPSON, J., delivered the opinion of the court.

This action was brought before a justice of the peace to recover a balance alleged to be due upon an open account. On appeal to the circuit court there was a trial *de novo* by the court, a jury having been waived, and a judgment in favor of the plaintiff from which the defendant has appealed.

Objection was made before the justice and in the circuit court to the jurisdiction of the justice, on the ground that the plaintiff and defendant were, in respect of the transaction out of which the account grew, partners, and that a justice of the peace has no jurisdiction of a suit to settle the accounts of a partnership, the same being a suit in equity.

The plaintiff in his testimony stated the arrangement which existed between him and the defendant, out of which the matters of account grew, in the following language: "The conditions on which the defendant worked for me are these: I furnished the cigars and tobacco for the defendant to sell, and I was to bear half the expenses of selling the cigars and tobacco, and the defendant was to sell the cigars and tobacco, and to bear half the expenses in doing so, and each was to bear half the losses on the sale of the cigars and tobacco sold by the defendant, and each was to get half of the profits from the sale." The defendant's version of the arrangement was substantially the same as that of the plaintiff. In addition to this, it appeared that the plaintiff furnished the horse and wagon which the defendant used in peddling the cigars and tobacco.

On the trial the plaintiff gave evidence tending to show that he and the defendant had accounted together, and that the defendant had admitted that there was due the plaintiff a balance in excess of the amount sued for. There was this infirmity, however, in this part of the plaintiff's testimony, that this alleged admission was

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made on the third of January, 1883, and that they went on with the arrangement as before, and that it did not terminate until the middle of March. We do not, therefore, see how such evidence would have had a tendency to prove that the plaintiff and the defendant had agreed upon the balance which was due in March, when the arrangement terminated. As there are a number of items in the account, of date subsequent to January 3, 1883, it is difficult to understand upon what principle the plaintiff could have supposed that this evidence tended to prove what is necessary to be proved in order to sustain an action upon a stated account, viz., that the minds of the accounting parties met and agreed upon the balance claimed to be due. The theory of an account stated is that the parties have accounted together, agreed upon a balance, and that the debtor has promised to pay it; and accordingly it is necessary for the plaintiff, in declaring upon an account stated in a court of record, to allege that the defendant promised to pay the balance so found to be due. *Brown v. Kimmel*, 67 Mo. 430; *Cape Girardeau v. Kimmel*, 58 Mo. 83; *Ward v. Farrelly*, 9 Mo. App. 370. Such an allegation is obviously not made good by proof that somewhere in the middle of the account, in point of time, the parties talked the matter over and the defendant promised to pay a balance then found to be due, the same not being the balance sued for. The admission of the defendant, if made, on the third of January, 1883, that there was a balance due by him to the plaintiff of $247.81, in connection with the evidence of the subsequent charges and discharges, was, at most, an evidential fact tending to show the correctness of the account sued on, regarding it as an open and not as a stated account.

The court, at the request of the defendant, gave the following declaration of law:

"If the court believes from the evidence that

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the plaintiff and the defendant, at or before the time of the commencement of the account sued on, entered into a contract by which the plaintiff was to furnish the cigars and tobacco to be sold and to bear half of the expenses incurred in selling said cigars and tobacco, and the defendant was to sell said cigars and tobacco, and to bear half the expenses incurred in selling said cigars and tobacco, and each was to bear half the losses incurred on the sales of said cigars and tobacco, and each was to get half the net profits realized from the sale of said cigars and tobacco; that the account sued on is based on the sale of said cigars and tobacco under said contract; and that there has never been any settlement of the account growing out of the sale of said cigars and tobacco, then the justice of the peace before whom this suit was brought had no jurisdiction thereof, and the court will find for the defendant."

If we are right in the conclusion that there was no substantial evidence tending to show a settlement of the account between the parties, this instruction is drawn in strict conformity with the undisputed evidence disclosed by the record. There is no substantial evidence in the record which contradicts any hypothesis therein. We can not understand how the court could have given it and afterwards returned a verdict for the plaintiff. If this instruction is the law of the case, the verdict and judgment were against the law, for this instruction states the undoubted facts of the case. But we are of opinion, for reasons hereafter stated, that this instruction is not the law of the case, and, therefore, that the contrary finding of the court upon the facts is not necessarily a ground for reversing the judgment. The finding of the court was evidently based upon the theory that there had been an account stated; but this theory, though erroneous, as

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we think, becomes immaterial in view of what we shall say hereafter.

The defendant also requested the court to give the following declaration of law, which the court refused:

"A justice of the peace has no jurisdiction over a suit in regard to unsettled partnership accounts, and the circuit court can not acquire any jurisdiction of such suit by appeal."

This instruction states the undoubted law. But it does not follow that it was applicable to the facts of this case, and it was probably refused for that reason. A suit for the settlement of a partnership account is strictly an equitable proceeding, and the statute provides: "No justice of the peace shall have jurisdiction to hear or try * * * any strictly equitable proceeding." Rev. Stat., sect. 2337. That the remedy of one partner against the other in such a case is a remedy strictly in equity, is a necessary conclusion from the rule which has always obtained in this state, that one partner can not maintain an action at law against another partner in respect of partnership matters, until after a settlement between them of the partnership accounts and the striking of a balance. *Stothert v. Knox*, 5 Mo. 112; *Springer v. Cabell*, 10 Mo. 640; *Smith v. Smith*, 33 Mo. 557; *Bond v. Bemis*, 55 Mo. 524. The right to relief in equity in such cases, is grounded on the inadequacy of the remedy at law. 1 Story Eq. Jur. sect. 663. The old common law action of *account render*, which was resorted to by one partner against another in order to compel a settlement and liquidation of the partnership transactions (Co. Litt. 172 *a;* Fitzherbert Nat. Brev. 117 *d*), has never had any place in our remedial system; and, therefore, the legislature in using the words, "any strictly equitable proceeding," in the section above quoted, must have intended to exclude the jurisdiction of justices of the peace in actions involving the settlement of partnership transactions.

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But it does not follow from this that the justice of the peace had no jurisdiction of this action. The record nowhere discloses that this was an action brought for the settlement of a partnership account. The evidence does not show that the plaintiff and the defendant were partners. A mere participation in the profits and losses of the business does not necessarily create a partnership. *The State ex rel. v. Finn*, 11 Mo. App. 546; *Dwinel v. Stone*, 30 Me. 384; *Musser v. Brink*, 68 Mo. 242; *Donnell v. Harshe*, 67 Mo. 170; *Hanson v. Jones*, 20 Mo. App. 595. "There must be," said Shepley, C. J., "such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, and dispose of the whole property; a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased." *Dwinel v. Stone*, *supra*. No such an agreement was shown in this case—no community of ownership in the horse and wagon, tobacco and cigars, with which the business of the two adventurers was carried on, which could have survived to the defendant upon the death of the plaintiff. This case, then, does not differ from any other action upon an open account containing a large number of items, by a principal against his agent, or by a merchant against his factor, to recover the balance due; and it would be introducing a novelty into our remedial system to hold that justices of the peace have no jurisdiction of such actions, where the balance claimed is within the limit of their pecuniary jurisdiction.

After the evidence was all in the court, against the objection of the defendant, allowed the plaintiff to amend the account sued on so as to change the account from an action upon an open account to an action for a balance due upon a stated account. This was done by adopting the items of the account originally sued on down to the date of the alleged settlement on January

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3, 1883, and striking a balance of $247.81, as the balance due on that date, rejecting the subsequent charges, as they appeared in the original account, and then adding the following recitals:

"1883.				
"Jan. 3.	To amount found and agreed to be due to I. Newberger from S. M. Friede, on accounting and settlement together...........			$247 81
"1883.				
	"Cr.			
"Mar. 24.	By cash.......................	$ 50 00		
"July 13.	" "	130 00	180 00	
	Balance due....................			$67 81"

This ruling was objected to on the ground that it had the effect of changing the cause of action. The statute provides: "The same cause of action, and no other, that was brought before the justice, shall be brought before the appellate court upon appeal." Rev. Stat., sect. 3058. Another section provides: "In all cases of appeal, the bill of items of the account sued on, or filed as a counter claim or set off; or the statement of the plaintiff's cause of action, or of the defendant's counter claim or set off, or other ground of defence filed before the justice, may be amended upon appeal in the appellate court, to supply any deficiency or omission therein, when by such amendment substantial justice will be promoted; but no new item, or cause of action, not embraced or intended to be included in the original account or statement, shall be added by such amendment. * * *" Rev. Stat., sect. 3060. We hold, in conformity with our ruling in *Hanson v. Jones* (*supra*), that this statement did not state a new cause of action within the meaning of the statute.

It does not follow from the foregoing that the judg-

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ment will have to be reversed. Whether the action is treated as an action upon a stated account, or as an action upon an open account, upon the undisputed evidence of the plaintiff, he was entitled to recover the amount for which the court gave him judgment. The only witness for the defendant as to the merits of the controversy, except upon the question of partnership, was the defendant himself, and he did not deny that there was a balance due as claimed, although he professed to have kept an account of the transaction, but merely denied that he and the plaintiff had ever accounted together and struck a balance. In such a state of the record, any supervening errors must be regarded as having had no influence upon the result.

The judgment is accordingly affirmed. All the judges concur.

THOMPSON, J., delivered the opinion of the court on re-hearing.

We have granted a re-hearing in this cause, and have heard the parties at the bar and by brief, on the question whether the agreement shown by the undisputed facts of this case constitutes a partnership between the plaintiff and the defendant. The further light which the counsel were able to throw upon the question, and the careful consideration which we have since given to it, only serve to convince us that while the question, if we could regard it as a new question, would be one of difficulty, we must, in conformity with the latest controlling decisions of our supreme court upon it, adhere to our former opinion. The question is governed, and our judgment upon it concluded, by the decision of the supreme court in *Donnell v. Harshe* (67 Mo. 170), re-affirmed and applied in *Musser v. Brink* (68 Mo. 242). In *Donnell v. Harshe* the manner in which the question arose is not essentially different from the manner in which it arises in this case. In an

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action at law upon an account, the defendant pleaded a counter-claim, and the plaintiff replied that the matter of the counter-claim grew out of an unsettled partnership business between him and the defendant. If this reply stated the fact, the matter was not a proper subject of a counter-claim, since to allow it to be pleaded as a counter-claim would be tantamount to allowing the defendant to recover upon it in an action at law The evidence showed that the alleged partnership out of which the matter of counter-claim arose, was merely an agreement between the plaintiff and the defendant, to cultivate on shares a farm belonging to the defendant, each to defray a moiety of the expenses and to have a moiety of the profits. The supreme court, after full consideration of the subject, held that this was not a partnership, and in the opinion of the court, written by Judge Napton, the doctrine laid down by the supreme court of Maine in *Dwinell v. Stone* was quoted as the law of the case. That doctrine, as quoted in our former opinion, is that, in order to constitute a partnership, as between the parties themselves, there must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, and dispose of the whole property—a right which, upon the dissolution of the partnership by the death of one, passes to the survivor, and not to the representatives of the deceased. It is true that the decision of our supreme court in the previous case of *Lengle v. Smith* (48 Mo. 276), seems to be explicitly to the contrary, upon a state of facts not dissimilar, in substance, to the facts in *Donnell v. Harshe*, or to those in the case at bar; the court there holding that a partnership may exist in profits and losses merely, without a community of ownership in the property, which is the subject of the joint venture, such as will drive one of the parties, seeking a remedy against the other in respect of it, into a proceeding in equity. But we are bound to follow the last controlling

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decision of the supreme court on the subject, and to regard *Donnell v. Harshe* as overruling *Lengle v. Smith.*

It follows that we must adhere to our former opinion and affirm the judgment. It is so ordered. All the judges concur.

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JAMES FENWICK, Defendant in Error, v. A. C. WHEATLEY, Plaintiff in Error.

St. Louis Court of Appeals, December, 21, 1886.

1. HOMESTEAD—EQUITY—STATUTORY PROVISIONS.—The pleadings and the evidence must bring the case within the provisions of section 2698, Revised Statutes, before the court can make an order in equity under the provisions of the homestead act.

2 ——— ESTOPPEL—EXECUTION SALES.—In the absence of fraud or mistake which would entitle an execution creditor, participating in the proceeds of a sale under execution, to equitable relief, he is estopped to deny the validity of the sale on the ground that the homestead of the execution defendant was set apart on an erroneous valuation.

ERROR to the Lincoln County Circuit Court, ELIJAH ROBINSON, Judge.

Reversed and dismissed.

CHAS. MARTIN and DYER, LEE & ELLIS, for the plaintiff in error: The commissioner's appraisement is conclusive after the lapse of the term of court, and can not be set aside except for fraud or mistake. Thompson on Homesteads, sects. 667-8; *Barney v. Leeds*, 54 N. H. 128; Freeman on Judgments, sect. 531. The plaintiff by participating in the sale, receiving a part of the

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sale, etc., is estopped from questioning the validity of the homestead proceedings. *Austin v. Loring*, 63 Mo. 19; *Slogel v. Murdock*, 65 Mo. 522.

R. H. NORTON and S. HERMANN, for the defendant in error: In a proceeding of the character of the one at bar, the action of the appraisers is not conclusive upon either party. *Schoeffer v. Beldsmeier*, 9 Mo. App. 438; *Straat v. Rinkle*, 16 Mo. App. 115. Where a judgment is a lien on the real estate of the debtor, the judgment will also be a lien on the proceeds of the sale of that land made by a sheriff; and especially is this the case when an execution upon said judgment has been levied upon that land. *Pocoke v. Pocoke*, 2 Mo. App. 119; *Warner v. Veitch*, 2 Mo. App. 462; *Ex parte Pearle & Lewis*, 13 Mo. 468; *The State v. Taylor*, 56 Mo. 492.

ROMBAUER, J., delivered the opinion of the court.

The petition states in substance that the plaintiff obtained a judgment against the defendant for $2001.36 and caused an execution to be issued thereon, which, together with a prior execution in favor of one Sands against the defendant, was levied upon the defendant's lands. That the defendant claiming a homestead exemption in the lands thus levied on, the sheriff appointed appraisers who set apart one hundred and thirty acres, as a homestead to the defendant, valuing such land at fifteen hundred dollars, whereupon the plaintiff directed the sheriff not to proceed any further with the execution, but to return it, which the sheriff did. That the whole one hundred and thirty acres was worth $3,250, and are used as an entire farm, and a severance of any part thereof would greatly depreciate the value of the rest.

The plaintiff prays judgment, setting aside the appraisement, decreeing the sale of the premises, and

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apportioning the proceeds between the plaintiff and the defendant in proportion to their respective rights.

A demurrer interposed by the defendant to this petition being overruled, he filed his answer, setting up among other the following facts, which the proof fully sustains, namely: That the plaintiff's execution, together with the Sands execution, was levied on all the lands of the defendant. That, after the homestead was set apart to the defendant by the appraisers, the residue of the land was sold under the Sands execution, and the proceeds of the sale paid to Sands and the plaintiff, and credited on their respective executions. That the plaintiff made no other objection either to the sale, or to the setting apart of the one hundred and thirty acres as the defendant's homestead, than telling the sheriff not to proceed further with his execution after the homestead was set apart. That the first exception that the plaintiff took to the report of the appraisers was when, at a subsequent term of the court, he filed the present petition.

It is obvious that, under these pleadings and proof the court was not authorized to vacate the appraisement made, and to appoint new appraisers, and that its doing so was manifest error. The petition seeks to state a case within the provisions of section 2698, Revised Statutes, and the pleader evidently attempted to bring himself within the rule established by this court in *Schaeffer v. Beldsmeier* (9 Mo. App. 439, 442), but has failed to do so. It was held in that case that if facts stated in section 2698, are claimed to exist and do exist, the plaintiff may, either by motion in the original proceedings, or by petition as a substitute for such motion, ask the court to carry out the provisions of said section, and that the court may, under the last clause of that section, make such orders in the premises as shall be equitable and needful, and thus carry into effect the equity of the statute.

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But the facts in the present case are widely different. The proof fails to show a case falling within the provisions of section 2698, nor does the petition contemplate a setting apart of the defendant's homestead in the original proceeding. The homestead right of the defendant, as far as the plaintiff is concerned, was finally determined in the original proceedings, when his homestead was set apart without any objection on the plaintiff's part as far as the record shows, and the residue of the lands was sold in that proceeding for the benefit of the plaintiff, and another execution creditor. It is immaterial that the sale was not made on the plaintiff's execution; he received the benefit of it, and is not in a position to question its validity. To that extent at least, the case of *Austin v. Loring* (63 Mo. 19, 22), is directly in point.

The plaintiff's petition is not in the nature of a bill to vacate the proceedings for fraud. No fraud is alleged, and the proof is clear that the first appraisers acted in good faith, and according to their best judgment. In fact if we had power so to do, and were to determine the question anew upon the proof preserved in the record, we could find no just ground on which to vacate the original appraisement.

All the judges concurring the judgment is reversed and the petition dismissed.

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W. T. LARIMORE, Appellant, v. J. B. LEGG, Respondent.

St. Louis Court of Appeals, December 21, 1886.

1. PRACTICE—INSTRUCTIONS.—Instructions as to facts not in issue are properly refused.

2. ——— DEFINITIONS.—The meaning of words in ordinary, or in commercial use, need not be defined in instructions.

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

A. R. TAYLOR, for the appellant.

TAYLOR & POLLARD, for the respondent.

ROMBAUER, J., delivered the opinion of the court.

The only complaint made by the appellant in this case is that the court erred in its instructions to the jury.

The suit is one upon a promissory note by the indorsee against the indorser, and the only controversy of fact between the parties is, whether the defendant had indorsed the note for the accommodation of the maker (one Schonhorst), as the plaintiff claims, or whether he had so indorsed it for the accommodation of the plaintiff, as the defendant claims. There was substantial evidence to sustain the defendant's version of the contract.

Upon request of the plaintiff the court instructed the jury as follows:

"1. The law presumes that the defendant, Legg, signed the note sued upon as an indorser to secure the

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payment of the sai l note, and the burden of proof is on the defendant to satisfy the jury to the contrary."

"2. If the jury find that the plaintiff, by his agent, J. W. Larimore, required as an inducement to accepting the note sued upon, and paying a portion of the indebtedness of Schonhorst, that the defendant, Legg, should endorse the said note, and that the defendant, Legg, did, thereupon, at the request of the said John W. Larimore, endorse said note, then the plaintiff is entitled to recover."

The following instructions asked by the plaintiff were refused, and their refusal is assigned for error:

"The court instructs the jury that the law presumes that the defendant signed his name on the back of the note sued upon as an endorser, and that the defendant agreed that if the said note, at its maturity, was presented to the maker, Schonhorst, and payment thereof demanded and refused, and that the defendant, Legg, was notified thereof within a resonable time thereafter, then the said Legg would pay the note."

"The court instructs the jury that if they believe from the evidence that the defendant, Legg, endorsed the note sued upon at the request of John W. Larimore, agent of the plaintiff, to induce the plaintiff to pay off the indebtedness of Schonhorst, and accept the said note in payment of such outlay, then the plaintiff is entitled to recover."

The point made, that the first of these refused instructions advises the jury as to the nature of an indorser's contract, and should have been given on that account, is untenable. How could the plaintiff be prejudiced by not having the jury instructed as to the nature of an indorser's contract, when in another instruction the court tells the jury that the plaintiff was entitled to recover if the defendant was an endorser for

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value. The testimony raised no issue as to the dishonor of the note, and timely notice thereof to the defendant.

The second instruction refused, while otherwise unobjectionable, is in substance a mere repetition, in another form, of the second instruction given. Multiplicity of instructions only tends to confound the jury.

Nor is there any valid objection to the instruction, given upon the defendant's request, that "If they believe from the evidence that Legg, at the request of John W. Larimore, endorsed the note in question for the accommodation of Mr. Larimore, the plaintiff, then they will find for the defendant, Legg."

Accommodation is an English word in ordinary use, and when applied to negotiable paper, in ordinary commercial use. Its meaning, when thus used, is not different from its legal meaning.

The instructions given, taken together, submitted to the jury the only question at issue fairly. That question was, whether the plaintiff parted with any value on the faith of the defendant's endorsement. That the defendant received no other value for his endorsement is not disputed. The jury, upon substantial evidence, determined the issue thus submitted to them against the plaintiff, and their finding is conclusive.

The judgment is affirmed. All the judges concur.

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JOHN O'BRIEN ET AL., Respondents, v. A. B. MAYER, Appellant.

St. Louis Court of Appeals, December 21, 1886.

BUILDING CONTRACTS—QUANTUM MERUIT—PART PERFORMANCE.—A contractor can not recover on a *quantum meruit* for a part performance of a subsisting and continuing contract.

APPEAL from the St. Louis Circuit Court, SHEPARD BARCLAY, Judge.

Reversed and remanded.

MUENCH & CLINE, for the appellant: The contract is an entirety, and is not to be treated as a succession of contracts, each item furnishing a separate and distinct cause of action. *Railroad v. Levy*, 17 Mo. App. 508, and cases cited; 2 Parsons on Contracts [5 Ed.] 517. The respondents must sue either on the contract, or plead and prove circumstances such as to raise a new contract and give them a remedy on a *quantum meruit.* 2 Parsons on Contracts [5 Ed.] 522. The appellant has a right to such a judicial determination of this matter as to prevent the respondents from suing him hereafter, when they perform the next item, or each succeeding item, of work called for by the contract. *Mansur v. Botts*, 80 Mo. 651, 651; *Stone v. St. Louis Trib. Co.*, 52 Mo. 342, 347.

FISHER & ROWELL, for the respondents: The court below properly refused the declaration of law asked by the defendant. It did not follow without condition, that the plaintiffs could not recover if they had agreed to put up the machinery sued for in lieu of similar machinery they had agreed to put up at another point.

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They might, under the conditions shown at the trial, abandon the contract and sue for the value of the chimney, breeching, etc. *Yates v. Ballentine*, 56 Mo. 530; *Haysler v. Owen*, 61 Mo. 275; *Eyerman v. Mt. Sinai Cem. Ass'n*, 61 Mo. 491; *Davis v. Brown*, 67 Mo. 314; 2 Parson's Cont. [7 Ed.] 522-3; *Mansur v. Botts*, 80 Mo. 655.

ROMBAUER, J., delivered the opinion of the court.

The plaintiffs and the defendant entered into the following contract:

"ST. LOUIS, May 8, 1883.

"*A. B. Mayer, Esq.*

"DEAR SIR:—We propose to make for you and erect at your factory, on Harrison street, three boilers, twenty-two feet by forty-two inches in diameter, each to contain two fifteen-inch flues, properly riveted to the heads; also, one steam drum, twenty-six inches in diameter by ten feet long, one mud drum, twenty inches by fifteen feet long; drums to be connected to the boilers with good bonnets made of best flange steel. Diameter of legs on steam drum ten inches by twelve inches long; legs on mud drum eight inches by fourteen inches long. Material in shells of boiler to be the best C. H. No. 1, one-fourth inch thick. The heads to be of the best flange, one-half inch thick. Drums to be of same material as the boilers. All the longitudinal seams to be double riveted on boilers and steam drums, and all plates to be beveled ready for caulking before being riveted, so as not to break the skin of the plates by the use of the chipping chisel after being riveted. All the punching shall be done with a nipple or center punch, so that all holes will be fair, and no drifting allowed; also two four-inch safety valves, properly riveted, with wrought flanges and nipples; also, one two and a half-inch blow-off valve, one two-inch check valve, one glass

water gauge, separate, with seven gauge cocks, and one steam good gauge; also, new fire front, together with back plate, back stand, and full set of fine grate bars, four feet long, for burning slack coal; one breeching to fit the three boilers, and one chimney, fifty feet high by forty-two inches in diameter, with damper iron in chimney, to be No. 14 iron; that in breeching to be No. 12. The above job to be put up and left ready for brick work and pipe connections, all in the best workman-like manner. Also, one battery of three boilers, the same as above mentioned, to be erected in your factory in Lowell, all for the sum of $600. And the punching and shearing machine, and the two boilers in the factory on Harrison street, and the two boilers in your factory in Lowell, the old boilers and fixtures belonging to them, to be removed by us; also, the punching and shearing machine and the new boilers to be put in position by us, with chimney properly fastened, boilers to be hand-riveted instead of machine-riveted; also, one man-hole on steam drum large enough to allow a man to get in. Each boiler twenty-two feet long by forty-two inches in diameter. Front to have damper doors on boilers. Three boilers to be ready for Harrison street on or before September 1, 1883; the Lowell boilers to be ready thirty days later.

"Very Respectfully,
"JOHN O'BRIEN & CO.

"Accepted May 15, 1883.
"A. B. MAYER,
"Per F. MAYER."

The plaintiffs thereupon entered upon the performance of their contract, put up one complete set of boilers, smoke stack, and attachments at the Lowell factory, and received the old machinery at said factory, the punching and shearing machine, and the sum of three hundred dollars in cash.

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After this was done the Lowell factory was destroyed by fire, and the plaintiffs at the defendant's request put up a chimney and breaching at said factory, the reasonable value of which, including two man-heads, is shown to have been worth $218.50. The plaintiffs demanded payment of this amount from the defendant, but the defendant refused to pay it, claiming that all the work was covered by the contract between them, except the item of $6.50 for man-heads, for which item the defendant made a tender to the plaintiffs in cash.

The plaintiffs thereupon instituted suit against the defendant, before a justice of the peace, on the following account; which was the only statement of their cause of action:

"ST. LOUIS, July 22, 1884.

"M. A. B. Mayer & Son, to John O'Brien & Co., Dr.

2 Manheads, 10x15, at $3.25		$ 6.50
1 Chimney, 42" dia. x50' high, 1925 lbs., at 6c	$115.50	
1 Breeching, 894 lbs., at 7c	62.58	
1 Combing, 152 lbs., at 6c	9.12	
Putting same up, 54½ hours, Riggers, at 40c	21.80	
Drayage	3.00	212.00
		218.50

The plaintiffs recovered judgment before the justice and also on appeal before the circuit court, where the cause was tried without the intervention of a jury, and the only error assigned by the defendant on the present appeal is, that the trial court refused to give the following instruction or declaration of law which the defendant requested:

"The court declares the law to be, that if it appears from the evidence that the defendant requested the

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plaintiffs to do the work by them sued for (exclusive of the first item of $6.50), pursuant to and in accordance with the terms of the contract of May 8, 1883, and that the plaintiffs or either of them assented thereto, and erected such work at the Lowell factory of the defendant in lieu of at the Harrison street property, then for such work they can not recover in this action."

No other instructions were offered or given.

The record before us purports to contain all the testimony given at the trial. The plaintiffs gave evidence tending to show, that the work sued for was an independent job, and outside of the contract, that the breaching put up was different from that which was to be put up at Harrison street, and that the three boilers yet called for by the contract were worth the sum of nine hundred dollars.

The defendant on the other hand gave evidence tending to show, that the work sued for, with the exception of the two man-heads was work covered by the contract; that it was ordered as part of the contract work, and assented to as such by the plaintiffs, and that when the bill therefor was presented, the defendant told the plaintiffs to complete the residue of the contract work and he would pay them according to its terms, tendering the $6.50 for the man-heads, which he admitted to be outside of the contract.

There was no evidence that the contract had been abandoned by mutual consent, or had been wrongfully terminated by either party.

If the defendant's testimony was believed by the court there could be no recovery for the plaintiffs in this action beyond the $6.50, admitted to be outside of the contract. If that testimony was disbelieved by the court, such disbelief did not warrant the court to refuse a correct declaration of law founded on the hypothesis of its truth.

From a memorandum of the court, found in the

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transcript, it would seem that the court justified its action by the law established in this state in *Lee v. Ashbrook* (14 Mo. 378), and since followed in very numerous cases. *Lamb v. Brolaski*, 38 Mo. 53; *Yates v. Ballentine*, 56 Mo. 530; *Haysler v. Owen*, 61 Mo. 275; *Eyerman v. Mt. Sinai Cemetery Ass'n*, 61 Mo. 491; *McCullough v. Baker et al.*, 47 Mo. 401; *Davis v. Brown*, 67 Mo. 313. That law is to the effect that, where work under a special contract is done by one, and accepted by another, and such work is beneficial, the party doing the work may, in case of the abandonment of the contract, or even its wrongful termination by himself, recover the reasonable value of such work, leaving the other party to his cross-action for damages resulting to him from the non-performance of the contract, which damages he may assert to recoup the plaintiff's recovery, or, if sufficient in extent, to defeat the plaintiff's recovery altogether.

But none of these cases assert the proposition, that a party who does work under a contract, may recover before the termination of such contract in some manner known to the law, upon a *quantum meruit* for its part performance. So holding, would be to make a contract for the parties which they had not made themselves, and would enable the contractor to bring numerous actions for work done under the same contract, by suing for the reasonable value of each parcel of work when done.

We must hold that under the evidence the defendant was entitled to the declaration of law which he requested, and that the court's refusal to give it was prejudicial error.

All the judges concurring the judgment is reversed and the cause remanded.

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L. P. MOOERS, Appellant, v. CHARLES MARTIN, Respondent.

St. Louis Court of Appeals, December 21, 1886.

1. LANDLORD AND TENANT—FORFEITURE OF PREMISES—AFFIDAVIT.—A landlord, in bringing his action by summons for rent due and for the premises, under the statute, must, in his affidavit, state all the rent that is due, but a statement of less than is actually due will not bar his recovery.

2. ——— SPLITTING DEMANDS.—The bringing of a second suit by landlord's summons for additional rent is not a waiver of rent claimed, nor of the forfeiture of the premises asserted in the first suit, but if the demands sought to be enforced existed when the first suit was begun, that may bar a recovery in the second suit.

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Transferred to the Supreme Court.

BROADHEAD & HAEUSSLER, for the appellant: The plaintiff had a right to sue for each month's rent separately, as each constituted and was ground for a separate cause of action, after it was due and earned, but could not be recovered for as a money demand until earned, although payable in advance by terms of contract. *Bridle v. Grau*, 42 Mo. 359; *Wagner v. Jacoby*, 26 Mo. 532.

L. D. SEWARD, for the respondent: A suit for rent and possession must state all the rent due, and the cause of action can not be so divided as to support two actions for rent and possession. *Wolff v. Shinkle*, 4 Mo. App. 197; *Vaughn v. Locke*, 27 Mo. 292.

THOMPSON, J., delivered the opinion of the court.

This is a proceeding under the landlord's and ten-

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ant's act for rent in arrear and restitution of premises. The complaint shows that the premises were rented for one hundred dollars per month, payable in advance on the first day of every month. The suit was commenced on October 21, 1885, and the demand is for the unpaid rents for the months of August and September. It appears that on the same day the plaintiff commenced a similar proceeding for the October rent, but this was afterwards dismissed in the circuit court. On the defendant's appeal from the justice, this cause was heard by the court without a jury, and judgment was given for the defendant. Uncontradicted testimony showed that the defendant had vacated the premises in controversy on December 12, 1885, before the trial of this cause in the circuit court, and that the plaintiff had since been in possession of the same. The court refused two instructions requested by the plaintiff, the substance of which was that, under the facts above recited, if the rent payable August 1, September 1, and October 1, had been demanded of the defendant by the plaintiff, and payment refused, the plaintiff could maintain this action for the rent, payable August 1 and September 1, and that it was no bar to her right of recovery that she did not set forth in her affidavit that the rent payable October 1 had been demanded and not paid.

In refusing these instructions, and in rendering judgment for the defendant upon the facts above set out, about which there was no controversy, the learned judge seems to have proceeded upon the case of *Wolff v. Shinkle* (4 Mo. App. 197), and kindred cases, which hold that, in a proceeding by landlord's summons under the statute, it is necessary for the plaintiff to demand and to state in his affidavit the exact amount due, in order that the tenant may prevent a forfeiture of the term by paying this amount. *Vaughn v. Locke*, 27 Mo. 292; *Cook v. Decker*, 63 Mo. 328. The statute in terms requires that the statement shall set forth "the amount of rent

actually due." Rev. Stat., sect. 3098. But neither the terms of the statute nor these decisions go so far as to oust the plaintiff of all remedy because, although he has demanded the actual amount of rent due, as the plaintiff did in this case, he has failed to state in his affidavit that rent was due for the month which had not expired at the time of the bringing of the action. While a party might justly be held, by not including all that is due to him on one account, in one action, to have waived the residue, and while the tenant, by tendering the two months' rent sued for in this action, would clearly have saved a forfeiture, yet we do not believe that there can be found in any civilized system of jurisprudence a principle so absurd as that the plaintiff is to be ousted of all remedy, whether in an ordinary proceeding, or in a proceeding to enforce a forfeiture, merely because he does not sue for all that is due him. Such a principle would turn the indulgence which a creditor might choose to extend to his debtor, into a sword to strike down the rights of the creditor. We do not believe that our supreme court intended so to decide, either in *Vaughn v. Locke*, or in *Cook v. Decker* (*supra*). In *Vaughn v. Locke*, the defect in the statement was, that the landlord had demanded and was suing for *more* than was due; and in *Cook v. Decker*, the objection to the statement was, that the rent was payable in specific property (lead ore), and that it was not clear, from the statement, what was the amount due; and the court, while quoting the language of Judge Napton in *Vaughn v. Locke*, the substance of which was that the plaintiff must demand, in his affidavit, the amount really due, held that he had done so in the particular case. The language used by Judge Hayden in *Wolff v. Shinkle* (*supra*), admits of the construction that if the landlord make the mistake of demanding and suing for a less amount of rent than is actually due, he thereby waives a forfeiture. The facts of that case did not necessarily call for a decision of that point; if they

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had done so, we would not hesitate to overrule that case on that point. As it is, we merely express our disapprobation of any language asserting that principle.

But we reaffirm the principle laid down in *Wolff v. Shinkle*, that by accepting payment of rent for periods of time subsequent to that for which the plaintiff brings the landlord's summons, he thereby waives the right to the summary remedy given by the statute, and the rent due for the preceding periods loses its distinctive character as rent and becomes a mere debt. We reaffirm the doctrine of *Horn v. Peteler* (16 Mo. App. 438), that the same effect follows where the landlord accepts the tenant's negotiable note for rent accruing at a date subsequent to that for which he brings his landlord's summons under the statute.

The only remaining question is whether, by reason of anything disclosed by the evidence, there has been such a waiver in this case. We can see no evidence tending to show such a waiver. The evidence shows that the plaintiff demanded all the rent due (including that for the month of October, payable on the first of the month, though not entirely earned), and that she brought a separate landlord's summons under the statute for the October rent. We can see in this no purpose whatever to waive her rights under the statute, and to allow the rent due for August and September to lose its distinctive character as rent and become an ordinary debt. The institution of the suit for the August and September rent was a distinct assertion of forfeiture, and it is not apparent how the assertion of a still further forfeiture, for non-payment of the October rent, although such assertion may have been erroneous, was a waiver of the prior forfeiture. She was suing for two things, as she might do under the statute, restitution and rent due. As she was claiming a forfeiture, it was by no means clear that she could include in her suit rent due by the con-

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tract, but not earned. Forfeitures are not favored, and we know of no principle on which a landlord can forfeit the term for unearned rent payable in advance, and at the same time recover the rent. He can, indeed, bring an ordinary action for the unearned rent and recover it, but this would not prevent him from allowing the rent to be earned by allowing the tenant the use of the premises until it should be earned.

The plaintiff, then, was confronted with this dilemma: either to include in her statement in this case the October rent, at the risk of having her whole proceeding fail by reason of having sued for too much, or not to include it. She chose not to include it. And because she made it the basis of a contemporaneous action under the statute, which action was improvidently brought and subsequently dismissed, it is argued that she has waived her right to maintain this action. Such a conclusion is quite untenable.

Aside from these facts, the defendant himself gave evidence, not contradicted, to the effect that before the trial in this cause in the circuit court, he had surrendered possession of the premises to the plaintiff, and that the plaintiff had ever since then been in possession. Upon this state of facts, all that the judgment of the court could have given her was the two months' rent for which she was suing. The judgment which was entered had, then, merely the result of turning her out of court because she was suing for two hundred dollars only, instead of suing for three hundred dollars. The whole substance of the defendant's contention then is, that he was prejudiced in a legal sense because she did not sue him for three hundred dollars, instead of two hundred dollars. Why should she be obliged to sue for three hundred dollars instead of two hundred dollars, in order to have her writ of restitution, when the statute (sect. 3100, Rev. Stat.) expressly gives her the right to sue for restitution without suing for any rent at all?

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The judgment should be reversed, and judgment will be entered here for the plaintiff, upon the uncontradicted facts of the case, for the amount of rent demanded in her statement herein, with interest, according to the prayer thereof. It is so ordered. Judge Rombauer concurs. Judge Lewis, dissenting, is of opinion that this decision is contrary to a previous decision of the supreme court. The cause will, therefore, be certified and transferred to the supreme court, as directed by section six of the constitutional amendment, adopted on November 4, 1884.

LEWIS, P. J., delivered a dissenting opinion.

I am unable to concur in the conclusion of my learned associates, chiefly on account of its direct antagonism with repeated rulings of our supreme court, and of this court, as I understand them. It seems to me that a serious mistake underlies the whole reasoning of the majority opinion. This consists in treating the present proceeding as a specific action for the collection of rent, the ouster of the tenant being a mere incidental adjunct to the remedy. Here is clearly an unauthorized transposition of terms. The leading intent of the landlord's and tenant's act is, primarily, a restitution of possession to the land owner, while the collection of rent in arrear is appended as an incident which, by the express terms of the statute, the landlord may eliminate without prejudice to his recovery of the possession. All the arguments so strongly presented against the denial of a plaintiff's right to sue for less than he might claim, if he would, and supposed to be illustrated in this case by the plaintiff's being turned out of court because she sued for two hundred dollars instead of for three hundred dollars, might have a controlling force in any suit for the mere collection of money. But they have not the least application to a controversy about a forfeiture, whose conditions are exactly prescribed by contract or by law,

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and which must fail if any of such conditions be either disregarded or waived.

The landlord's and tenant's law of Missouri, and kindred enactments in other states, are handed down, in substance, from the English jurisprudence, and are the legitimate offspring of the ancient sacredness of landed property. They assume an absolute right in the land owner to a constant enjoyment of his land. If that enjoyment be broken in upon by the failure of a tenant to perform the stipulations of his lease contract, a summary remedy, denied to other property rights, is provided for its prompt restoration, in the actual re-possession of the land. This remedy does not await the slow and uncertain pursuit of damages for the breach of contract. It at once annuls the contract, and wrests from the defaulting lessee all its prospective privileges, however secured, or supposed so to be. Such a wholesale destructive process is utterly inconsistent with a continuance of the relation of landlord and tenant for a single instant of time, after the event upon which the landlord assumes a forfeiture of the tenancy. Hence the authorities say, that any act of the landlord which implies a continuance of the tenancy with his consent, after the happening of such an event, will be *per se* a waiver of the forfeiture which that event might otherwise create. Our supreme court says of such a waiver: "Slight acts are deemed sufficient for this purpose, and any recognition of a tenancy subsisting after the right of entry has accrued and the lessor has notice of the forfeiture, will have the effect of a waiver." *Garnhart v. Finney*, 40 Mo. 460. The court here cites 2 Platt on Leases, where it is said, referring to more than twenty authoritative decisions: "And as forfeitures, to use the phrase of the books, are odious in law, slight acts on his (the lessor's) part have been deemed sufficient to amount to a waiver. Indeed, it may be stated as a general rule, that any recognition of a tenancy subsisting after the right of entry has ac-

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crued, and the lessor has had notice of the forfeiture, will have that effect. For example, an acceptance, *or an absolute and unqualified demand* of rent accruing due after the forfeiture, will operate as a waiver, whatever may be the secret motive of the lessor in taking *or demanding* it." In *Doe v. Birch* (1 M. & W. 408), Park B., said: "Then I think that an absolute unqualified demand of the rent, by a person having sufficient authority, would have amounted to a waiver of the forfeiture, and it would have been like the case I cited from Croke's Reports." In *Doe v. Miller* (2 C. & P. 343), it is held that a notice to quit at the end of half a year, given after the happening of a breach, is a waiver of the forfeiture previously accrued.

These well settled principles were the real groundwork which sustained the decisions in *Garnhart v. Finney* (40 Mo. 449); *Wolff v. Shinkle* (4 Mo. App. 197), and *Horn v. Peteler* (16 Mo. App. 438). My learned associates seem to assume that there is a distinctive force in the receiving of money, or of a promissory note, for rent accruing after a forfeiture. But how can either of those acts indicate a waiver of the forfeiture, except as it will amount to the recognition of a continuing tenancy, which could not co-exist with a forfeiture of the term? The decisions mentioned stand upon no imaginable basis other than that, and an unqualified *demand* of after-accruing rent is every bit as much such a recognition on the part of the landlord, whether the tenant pays the money, gives his note, or refuses to do either. So say all the authorities that touch the subject, excepting my learned associates in this case.

The application of these principles to the present case is simple enough. The suit proceeds upon an alleged forfeiture of the defendant's right of occupancy, by reason of his failure to pay the August and September rents. After these breaches had occurred, the plaintiff *demanded by suit* the subsequently accruing

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rent for october. This was a distinct recognition of the relation of landlord and tenant, as continuing to subsist after the last day of September; which continuing relation was wholly irreconcilable with an alleged forfeiture consummated by the August or September breach. That alleged forfeiture was, therefore, waived by the plaintiff, who had, consequently, no right to institute this proceeding for its enforcement. It is not of the least consequence that the October suit was dismissed. The plaintiff could not thus defeat the legal effect of her waiver. Nor does it matter whether the October rent was earned, or only due by the terms of the contract. In my opinion, the distinction is without a difference. In any event, the plaintiff, by her suit and demand, declared the defendant to be her continuing tenant for at least a part of the month of October, and this was precisely one of those "slight acts" which the law, in its abhorrence of forfeitures, deemed sufficient to constitute a waiver. It appears, as a matter of fact, that the tenancy continued until the twelfth of December, when the defendant surrendered his occupancy.

In my opinion, the decision of this court in the present case is contrary to the decision of the supreme court in *Garnhart v. Finney* (40 Mo. 449), and to the decisions of this court in *Wolff v. Shinkle* (4 Mo. App. 197), and *Horn v. Peteler* (16 Mo. App. 438); and this cause should be certified and transferred to the supreme court, in accordance with the provisions of section six of the constitutional amendment, adopted in November, 1884. Sess. Acts 1883, p. 216.

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GREEN'S BANK, Respondent, v. W. L. WICKHAM ET AL., GARNISHEES, Appellants.

St. Louis Court of Appeals, December 21, 1886.

1. **PRACTICE—APPELLATE.—A finding of the court, which is consistent with any theory under the proof, will not be vacated on appeal where no instructions are asked or given, and where the court has not erred in excluding competent evidence.**

2. **PARTIES TO SUIT ON ASSIGNED DEMAND.—The assignor of a demand transferred pending a suit thereon may prosecute the action to final termination.**

3. **GARNISHMENT — JURISDICTION.—In garnishment proceedings, the situs of the debt determines the court's jurisdiction, and that situs is where the debtor resides; unless the debt, by the terms of the contract creating it, is payable elsewhere.**

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed.

J. WICKHAM, for the appellants: The circuit court did not acquire jurisdiction over the defendant or the subject matter of the action. *Fithian v. Monks et al.*, 43 Mo. 515; *Bliss v. Smith*, 78 Ill. 359; Drake on Attachments, sect. 474. The judgment against the defendant was irregular and void for want of jurisdiction of the subject matter; it was the duty of the garnishees to resist a judgment against them for a debt which was not the subject of garnishment. Drake on Attachment, sect. 696; *Thayer v. Tyler*, 10 Gray, 164; *Smith v. McCutchin*, 38 Mo. 415.

WALTER B. DOUGLAS and WILLIAM H. SCUDDER, JR., for the respondent: No declarations of law being asked or given in a cause tried by the court sitting as a

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jury, the findings will not be disturbed, on appeal, if they can be supported on any theory of the law applicable under the proofs. *Miller v. Breneke*, 83 Mo. 163; *Hamilton v. Boggess*, 63 Mo. 233; *Gaines v. Fender*, 82 Mo. 509.

ROMBAUER, J., delivered the opinion of the court.

The plaintiff instituted suit by attachment against one Hudnall, and caused the defendants to be summoned as garnishees. The garnishees in answer to interrogatories propounded stated that Hudnall was their traveling salesman on a monthly salary, which he always drew in advance on the day it was due; that they owed him nothing and held no property belonging to him in their hands.

The plaintiff denied this answer, charging, among other things, that the garnishees were indebted, at the date of the service of the garnishment, to Hudnall in the sum of three hundred dollars, and paid him between that date and the date of the filing of their answer three hundred dollars.

These averments were denied by reply.

The amount of the plaintiff's claim was $73.59, and interest. The garnishment was served April 29, 1884. Interrogatories were filed June 3, 1884, and the garnishees answered June 5, 1884.

The plaintiff called two of the garnishees as witnesses. It appeared by their testimony, and by an account produced by them, among other things, that between the date of the service of the garnishment, and the date of their answer, they paid upon drafts drawn by Hudnall upon them the sum of one hundred and ten dollars, although the testimony is not very clear whether this money was paid on account of his salary, or on account of his traveling expenses, or on other accounts. It also appeared that they permitted Hudnall, after the garnishment, to make sundry collections, and to retain

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them on account. The court thereupon rendered judgment against the garnishees for $81.17, being the amount of the plaintiff's claim with interest.

No instructions were asked or given, nor were any points of law raised at the trial, except as hereinafter stated. Under these circumstances, if the finding and judgment of the court can be supported on any theory consistent with the proof, we are not at liberty to disturb it. *Miller v. Breneke*, 83 Mo. 163; *Gaines v. Fender*, 82 Mo. 497, 509; *Hamilton v. Boggess*, 63 Mo. 233, 251, 252; *Perkinson v. Fehlig*, 21 Mo. App. 327, 330; *Phillips v. Holthaus*, 21 Mo. App. 657. That the finding can be thus supported sufficiently appears from the facts above stated.

If the garnishees desired to raise the question that the debtor's salary for the *past* thirty days, although he was a non-resident, was not subject to garnishment in their hands under the provision of section 2519, Revised Statutes; or, that the drafts prior to the garnishment were in the hands of holders for value; or, that the funds were incumbered by certain trusts and not the subject matter of garnishment, they should have done so by asking appropriate instructions or declarations of law. Their failure to do so prevents their consideration here, although ably presented by their counsel in his brief.

There are two points urged by the appellants which we are at liberty to consider. The first is the jurisdiction of the trial court over the subject matter, and the next whether the plaintiff is the true party in interest.

The garnishees insist that the court had no jurisdiction of the subject matter, which in these cases is the debt, because the creditor resided in the state of Mississippi, and the situs of the debt is where the creditor resides. It is held by many very respectable authorities that the situs of a debt, for the purpose of determining jurisdiction in garnishment proceedings, is the place

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where the creditor resides, unless the debt by the terms of the contract is payable elsewhere, and in the latter event such situs is at the place where the debt is payable. *Williams v. Ingersoll*, 89 N. Y. 508; *Green v. Bank*, 25 Conn. 452.

On the other hand it has always been held in the New England states, where proceedings of this kind first originated in this country, and were known as the trustee process, that the residence of the debtor to be charged as trustee determined the situs of the debt and the jurisdiction of the court over it. *Tingley v. Bateman*, 10 Mass. 343; *Lovejoy v. Albee*, 33 Me. 414.

While we are not aware that the exact question here presented was ever passed upon by courts of final resort in this state, the jurisdiction has frequently been exercised by holding debtors of non-resident creditors as garnishee. We think the better rule, and one likely to lead to the least complications, is to hold, that in all cases where the debtor resides in this state, and the debt is not by the terms of the contract payable elsewhere, he becomes chargeable as garnishee, and the court acquires jurisdiction to condemn the debt.

Nor is there any merit in the objection that the court erred in ruling out evidence offered by the garnishees to the effect, that since the institution of the attachment suit, the assets of the plaintiff were assigned to other parties. One to whom a claim is assigned during the pendency of a litigation thereon, may continue the suit in the name of the assignor. Sect. 3671, Rev. Stat.

All the judges concurring the judgment is affirmed.

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E. F. OSBORNE, Respondent, v. JOHN C. OLIVER, Appellant.

St. Louis Court of Appeals, December 21, 1886.

1. **WITNESS—IMPEACHMENT OF—PRACTICE—EVIDENCE.—The question as to whether a witness has been successfully impeached is one of fact, and, where there is substantial evidence on each side, is not reviewable on appeal.**

2. **PRACTICE—AFFIRMANCE WITH DAMAGES.—In an action on a written promise to pay, an appeal which brings up for review questions of fact only will not be considered as having merit, and the judgment will be affirmed with ten per cent. damages.**

APPEAL from the St. Louis Circuit Court, DANIEL DILLON, Judge.

Affirmed with ten per cent. damages.

O. B. GIVENS, for the appellant.

HERMANN & REYBURN, for the respondent.

THOMPSON, J., delivered the opinion of the court.

This action was commenced before a justice of the peace upon a due bill given by the defendant to the plaintiff for one hundred and seventy-five dollars. On appeal to the circuit court, the cause was tried before the judge without a jury. The defence there set up was that the due bill had been given without any consideration, and that the defendant was entitled to a set off in the sum of one hundred dollars. The court found in favor of the plaintiff on both of these isues and entered judgment accordingly. No instructions were asked for or given.

Three assignments of error are made in this court: 1. That the court erred in ruling out certain evidence

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offered by the defendant. 2. That the court erred in admitting certain evidence offered by the plaintiff. 3. That the evidence of the plaintiff was clearly and conclusively impeached, and that the court erred in not so finding.

In respect of the first and second of these two assignments of error, the appellant fails to put his finger upon any ruling of the court to which he especially objects, or to state any reason why the court should be put in the wrong by reason of any ruling made touching the admissibility of evidence. He simply says, in his argument and brief, that "exceptions were saved by the appellant to the court's ruling on the admissibility, or non-admissibility of evidence, which appears on record pages 15, 16, 20, 28, 29, 30, 31, and on many pages thereafter." We are thus expected to go on a hunt through the record, to see if we can not find some ruling by which, on some idea or other, which is not suggested to us by the appellant, we can reverse the judgment. The record has been read with care, and we find nothing touching the rulings of the court on the admissibility of evidence of which the appellant can make complaint upon any substantial grounds.

The assignment of error, that the evidence of the plaintiff was clearly and conclusively impeached, and that the court erred in not so finding, is equally idle. In the first place, the evidence of the plaintiff was not clearly and conclusively impeached. The plaintiff's general character was impeached by several witnesses and supported by several others, which left the question of his credibility fairly in the scale of doubt. But if his testimony had been impeached by a hundred witnesses, and if there had not been a single supporting witness, this could not be assigned as error; because, the question whether a witness has been successfully impeached is always a question of fact for the jury, or

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for the trier of the facts, and can not be decided as a matter of law.

We are asked to give ten per cent. damages in affirming the judgment for a frivolous appeal. This action is brought upon a written acknowledgment of indebtedness made by the defendant himself. His defence, that nothing was due when he gave the due bill, is opposed to all the probabilities of the case. His effort to show that it was a bar and gambling debt, while at the same time declining to do what he calls "plead the gambling act," is equally futile; because he does not claim how much of it is a gambling debt, or how much of it is a bar debt, or give any specific evidence to show that it represents money which he lost while gaming with the plaintiff, or in a gambling house kept by the plaintiff, or a debt incurred in the purchase of intoxicating liquors to be drunk at the plaintiff's bar; and the testimony of the plaintiff is distinctly to the effect that the due bill was given for borrowed money. The set-off which was attempted to be set up was overthrown by a decided preponderance of evidence.

There is no merit whatever in this appeal, and the judgment will be affirmed with ten per cent. damages. It is so ordered. All the judges concur.

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J. N. Morrison, Respondent, v. C. D. Yancey et al., Appellants.

St. Louis Court of Appeals, December 21, 1886.

1. Replevin—Action on Bond.—The cause having been dismissed because of the plaintiff's failure to give an additional replevin bond, and an assessment of damages on the bond having been prevented by the plaintiff's conduct, such failure of assessment will not prevent the defendant from maintaining an independent action on the bond against the plaintiff and his sureties.

2. Damages—Elements of Matter of Law.—Where the evidence furnishes no elements for the admeasurement of damages, it is error to tell the jury that they may give such damages to the plaintiff as they may find he has suffered.

Appeal from the St. Louis Circuit Court, Daniel Dillon, Judge.

Reversed and remanded.

Torrey & Givan, for the appellants: The defendant in a replevin suit, who fails to have his damages assessed in that suit, can not maintain an action against the plaintiff and his sureties on the replevin bond for damages. *White v. Van Houten*, 51 Mo. 577; *Hohenthals v. Watson*, 28 Mo. 360; *Farley v. Bryant*, 34 Mo. 512; *Boutell v. Warne*, 62 Mo. 350; *Dougherty v. Cooper*, 77 Mo. 535. If there was sufficient evidence to justify the court in submitting the cause to the jury it should have been directed as to the measure of damages. *Shenuit v. Brueggestradt*, 8 Mo. App. 46; *Pope v. Jenkins*, 30 Mo. 528; *Chapman v. Kerr*, 80 Mo. 158; *Mix v. Kepner*, 81 Mo. 96.

Frank M. Estes, for the respondent: The court, having failed to assess the damages when suit in re-

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plevin was dismissed, or to render judgment for the return of the property, the defendant in that action, and the plaintiff in this, is entitled to judgment on the bond for all damages sustained. *Elliott v. Black*, 45 Mo. 372; *Berghoff v. Heckwolf*, 26 Mo. 512; *Hansard v. Reed*, 29 Mo. 472; *The State ex rel. v. Six*, 80 Mo. 64; *Collins v. Hough*, 26 Mo. 149. In a suit on a replevin bond, the obligors can not avail themselves of the failure of the court to render the alternative judgment, for the return of the property or its value. *The State ex rel. v. Dunn*, 60 Mo. 64; Wells on Replevin (1880), sect. 423; *Robbins v. Foster*, 20 Mo. App. 519.

ROMBAUER, J., delivered the opinion of the court.

The facts of the case, as claimed by the plaintiff, are briefly stated as follows: In 1878 the defendant, Yancey, brought an action of replevin in the Wayne county circuit court, to recover a locomotive engine, and executed a bond in the penal sum of five hundred dollars with his present co-defendant as surety.

The suit was dismissed in 1878 by the court, without any trial on the merits, for failure on the part of Yancey to file an additional replevin bond, but no order was made for the return of the property, nor was any inquiry of damages had, the cause being continued for that purpose to a succeeding term. At a succeeding term of the Wayne county circuit court, the venue of the cause was changed to Iron County, upon the application of Yancey, and thereafter upon a motion made by the same party, in the Iron county circuit court, the cause was stricken from the docket of that court, on the ground that the change of its venue was improvidently and illegally made.

The present action is upon the replevin bond against the defendant, Yancey, and his surety, and the breach assigned is that he failed to prosecute the action with effect and without delay.

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In the trial court the plaintiff had judgment for five hundred dollars damages.

The first error assigned by the defendants appealing is that the court refused to instruct the jury, as requested by the defendants, that a judgment for the return of the property and an assessment of damages by the Wayne county circuit court was a condition precedent to the maintenance of this action.

This objection goes to the foundation of the entire proceeding. It is based upon sections from 3852 to 3855 of the Revised Statutes, and finds its main support in the case of *White v. Van Houten* (51 Mo. 577), where it was distinctly held that the damages are incidental to the main action, and where a replevin suit is prosecuted to judgment, all questions of value, damages, and costs must be determined in the same proceeding, and where that is not done an action on the bond can not be sustained.

It was said in that case that the case of *Berghoff v. Heckwolf* (26 Mo. 511), was an action instituted under the code of 1849, and the replevin act of 1845, but the case was distinguished from the case then at bar, and not distinctly overruled. On the other hand, in *Elliott v. Black* (45 Mo. 372), decided under the same statute as *White v. Van Houten*, the case of *Berghoff v. Heckwolf* is quoted with approval, the court stating that, where the complainant in a replevin suit fails to prosecute his suit to a successful issue, that failure constitutes a breach of the conditions of his return bond, and warrants a suit upon it, although there may have been no judgment in the replevin suit either for damages or a return of the property.

That the opinions filed in *Elliott v. Black* and *White v. Van Houten*, are irreconcilable in some of their details is apparent, but while it is the duty of this court to follow the last controlling decision of the supreme court, a proper respect for that court demands that we should endeavor to reconcile the apparent con-

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flict, if such can be done. It can be done in this instance upon the facts distinguishing the two cases. In *Berghoff v. Heckwolf*, as well as in *Elliott v. Black*, the replevin suit was not formally tried, in one the plaintiff took a voluntary non-suit and in the other his suit was dismissed by the court, whereas in *White v. Van Houten* there was a trial by jury and final judgment determining the rights of the parties.

Applying the law as deducible from all these cases to the facts of the case at bar it results that the plaintiff was not debarred of his action on the bond by the fact that he failed to have his damages assessed in the replevin suit. That suit was dismissed for the plaintiff's failure to file a sufficient bond, and being continued for an assessment of damages, was illegally removed upon the plaintiff's motion from the Wayne to the Iron circuit, and in the latter circuit upon the plaintiff's motion, stricken from the docket because illegally removed. It was the plaintiff, who, by his own action, prevented an assessment of damages in the replevin suit, and he is estopped from asserting that the non-assessment of damages in that suit is a bar to the present action.

It results that the first error assigned by the appellants is not well assigned.

The next complaint the appellants make is that the court admitted illegal testimony against their objection. This relates to the admission in evidence of the transcript of the record in the replevin suit, certified to by the clerk of the Iron county circuit court.

The certificate of that clerk does not show that the transcript is a copy of any original papers on file in his court, transmitted to him from the Wayne circuit court, but as far as all the proceedings in the Wayne circuit are concerned, it purports to be merely a transcript of a transcript.

It would seem that when the venue of the cause was changed to Iron county, the clerk of the Wayne

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circuit court, instead of transmitting to the clerk of the Iron circuit court a transcript of the record, and the original papers not part of the record proper, and on file in said cause, as required by Revised Statutes, section 3735, transmitted to him a mere transcript of all the papers, and the transcript objected to was a transcript of such transcript.

Under these circumstances the defendant's objection would have been well taken if confined to the transcript of the original papers, and placed upon the proper ground when the transcript of such papers was offered in evidence. But the objections, as confined to such parts of the transcript, were not sufficiently specific to be entitled to consideration, and, as affecting the entire transcript, were untenable, because parts of it were clearly admissible.

Where evidence is admissible for any purpose, the court is bound to admit it; its effect the opposite party may limit by instruction. *Soulard v. Clark*, 19 Mo. 570, 578; *Union Sav. Ass'n v. Edwards*, 47 Mo. 445, 449. The defendants in this case did endeavor so to limit it by asking the court to instruct the jury, "not to consider so much of the evidence offered as purports to be certified copies of the record and proceedings in the case of *Yancey v. Morrison*, in the circuit court of Wayne county," but the limitation thus attempted was too broad, because the transcript, as far as it purported to be one of a certified copy of the *record proper*, was, under the ruling of the court, in *Bettis v. Logan* (2 Mo. 2), clearly admissible.

We, therefore, find no error in this part of the case.

But the instruction of the court on the question of damages was clearly erroneous, and prejudicial to the defendants.

On that subject the only testimony was that of the plaintiff, and of one Hayes, formerly the master mechanic of the St. Louis & Iron Mountain Railroad. The latter testified that the locomotive in question was worth about

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eight thousand dollars, and that such engines rented for two hundred and fifty dollars a month, and that the engine, as far as he knew, had never been out of the possession of the railway company.

The plaintiff himself testified that the engine was taken out of his possession by Yancey, who held it for about ten months. That the plaintiff got permission from the station agent to keep the engine in the round house, and kept it there locked up. There was no pretense that the plaintiff could have rented the engine to anybody, or, as far as the testimony shows, made any use of it whatever, except to keep it locked up in the round house as he did. This being all the evidence on the subject the court instructed the jury as follows, and this was the only instruction which the court gave to them:

"The court instructs the jury that they will assess the plaintiff's damages in such sum as they believe, from the evidence, the plaintiff sustained, by the taking and detaining of the engine in controversy for the time such property was detained from the defendant under the writ of replevin read in evidence, not exceeding, however, the sum of five hundred dollars."

A similar instruction was given in the case of *Shenuit v. Brueggestradt* (8 Mo. App. 47), where this court said that the instruction left the jury to go by their own fancy, which they evidently did. They had evidently nothing else to go by in this case, as we have searched the record in vain to find any evidence therein which could have aided the jury to admeasure the damages, according to any standard known to the law.

What are proper elements of damages in any action is a question of law and not of fact, and the court should instruct the jury as to such elements. Where the testimony fails to disclose any definite damages, the court should instruct the jury to find for the plaintiff in nominal damages only.

For this error the judgment is reversed and the cause remanded. All the judges concur.

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AUGUST DUTZI, BY NEXT FRIEND, Respondent, v. ANDREW GEISEL, Appellant.

St. Louis Court of Appeals, December 21, 1886.

1. MASTER AND SERVANT—VICE-PRINCIPAL.—A person employed to perform a superintending duty which the law imposes upon the master, stands in the master's stead with relation to other servants.

2. ——— MASTER'S DUTY—MACHINERY.—A master is under obligation to see that machinery provided for the use of his servants is reasonably safe, regard being had to its nature and purposes.

3. ——— NOTICE.—Notice to one employed by a master to inspect machinery, that such machinery is defective, is notice to the master.

4. NEGLIGENCE, CONTRIBUTORY—REASONABLE CARE.—An act which a careful person would ordinarily avoid may not be negligent when done under the impulse of sudden fear or surprise.

5. PRACTICE—JURY—SPECIAL QUESTIONS.—The court's refusal to submit certain specific questions to the jury is not ground for reversing the judgment, when it does not appear that their refusal was prejudicial to the party asking them.

APPEAL from the St. Louis Circuit Court, GEORGE W. LUBKE, Judge.

Affirmed.

KLEIN & FISSE, for the appellant: Under evidence showing that the injury and the negligence had no connection the court will direct a verdict for the defendant. *Dunn v. Railroad*, 21 Mo. App. 188. The master is not an insurer, and he is bound only to ordinary care in providing machinery for his employes. *Flynn v. Railroad*, 78 Mo. 195; *Cagney v. Railroad*, 69 Mo. 416; *Smith v. Railroad*, 69 Mo. 32. "If the person injured was fully aware of the hazard before the accident, or was guilty of negligence himself, he can not recover." *Nolan v. Shickle*, 3 Mo. App. 300; Deering on Negli-

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gence, sect. 201; *Woodward Iron Co. v. Jones* [Sup. Ct. Ala.] 23 C. L. J. 296. And in such case a judgment for the plaintiff will be reversed in the appellate court. *Lenix v. Railroad*, 76 Mo. 86; *Cagney v. Railroad*, 69 Mo. 416, 424; *Price v. Railroad*, 77 Mo. 508; *Dunn v. Railroad*, 21 Mo. App. 188.

TAYLOR & POLLARD, for the respondent: The right to hire and discharge employes is not the test as to whether a foreman is a vice-principal. *Dowling v. Allen*, 74 Mo. 13; *Moore v. Railroad*, 85 Mo. 593. The true rule now is, that the master is liable for all injuries caused by the negligence of a fellow-servant, when such fellow-servant is empowered with superior authority, and may direct the inferior. Wood on Master and Servant, 86; *Granville v. Railroad*, 10 Fed. Rep. 711; *Ford v. Railroad*, 110 Mass. 260; *Railroad v. Savally*, 36 Ohio St. 221; *Laning v. Railroad*, 49 N. Y. 521; *Filke v. Railroad*, 53 N. Y. 459; *Cowdon v. Railroad*, 78 Mo. 567; *Hough v. Railroad*, 100 U. S. 213. Notice to a person to whom the master has delegated the duty of providing suitable machinery for employes, is notice to the master. *Fuller v. Jewett*, 80 N. Y. 46; *Maloney v. Locomotive Works*, 14 R. I. 204; *Davis v. Railroad*, 53 Vt. 84; *Fay v. Railroad*, 30 Minn. 23; *Filke v. Railroad*, 53 N. Y. 459; *Ford v. Railroad*, 110 Mass. 260; *Hough v. Railroad*, 100 U. S. 213; *Cone v. Railroad*, 81 N. Y. 206; *Railroad v. Kirk*, 62 Tex. 227.

THOMPSON, J., delivered the opinion of the court.

This was an action for damages for injuries received by the plaintiff while operating a machine as an employe of the defendant. The plaintiff had a verdict and judgment.

As in most cases of this kind, the stress of the case is the question of the plaintiff's own contributory negligence. The plaintiff, a lad about sixteen years of age, was in the employ of the defendant and was put to work

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by the defendant's foreman with a machine used for cutting and crimping the caps and bottoms of tin cans. The machine and manner of operating it were exhibited to the jury at the trial. The machine had a broad platform, about three and a half feet from the floor, firmly fixed at an angle of about thirty-five degrees, the highest part being immediately in front of the operator and the slope being to the rear. In the center of this platform is a place where steel dies of various sizes may be adjusted. These dies are raised about three quarters of an inch above the plane of the platform, and firmly fixed thereon. Above the place where the die is so fixed there is a stationary slide supported from the rear of the machine, the bottom of which is about five or six inches from the top of the platform; and in this slide, operating perpendicularly to the lower die, there is a punch supplied with a counterpart of the lower die. When in the operation of the machine, the punch and upper die are brought down, they descend exactly over the lower die, and can not descend anywhere else, or move in any other direction. Attached to the machine at the right of the operator there is a fly-wheel, which is constantly kept in motion by the belt connected with the shafting above it.

The motion of the fly-wheel, however, does not engage the sliding punch until, by a pressure of the foot upon a treadle, a clotch or piece of steel is projected into an opening left on the inside of the fly-wheel near its axle, and as the wheel revolves the clotch engages the sliding punch and brings it down upon the lower die with great power, cutting and turning up the edges of the tin placed on the lower die by the operator, and forming a cover or bottom for a tin can at one stroke. The cover so cut falls automatically to the rear of the machine. The instant the pressure is removed from the treadle the clotch is automatically withdrawn from its position and the fly-wheel revolves without operating the machine again until the sliding punch is again en-

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gaged in the same manner as above described. When the sliding punch has made its downward stroke, it immediately ascends and remains suspended, some four inches above the lower die, until it is again brought down by the projection of the clotch into the operating space of the fly-wheel. If the pressure of the foot is continued upon the treadle, the clotch continues to engage the sliding punch, and this in turn continues to ascend and descend until the pressure is removed, and then remains stationary above the lower die, as above described. If, therefore, the pressure upon the treadle is not immediately removed, upon the descent of the sliding punch, it will be re-engaged and descend again upon the lower die before the operator may wish it to come down. But no harm can come to the operator if he keeps his fingers from the lower die.

The evidence showed conclusively that the plaintiff was thoroughly acquainted with the danger attending the ordinary use of the machine, and thoroughly understood the necessity of keeping his hands away from the lower die, so that the descending punch could not touch them.

The plaintiff's evidence tended to show that, some days prior to the accident, the upper die had fallen while the plaintiff was working the machine and when his foot was not upon the treadle; that he had reported this fact to Gus Meyer, the assistant foreman, who had examined the machine, had oiled it, and had assured the plaintiff that the punch would not drop again without the plaintiff's foot being on the treadle. All the evidence in the case showed that Gus Meyer was the assistant foreman of the defendant, whose duty it was to put the boys at work in the particular room and to oversee them, and who had charge of the machinery in that room. As there is a question about the nature of the authority of Gus Meyer, it may be proper, in order to make ourselves more clear, to quote from the testimony adduced on behalf of the defendant upon this

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point. Adelbert W. Geisel, son of the defendant and his general foreman, testified as to the position of Gus Meyer: "He sets dies and attends to the machinery, that it is all right; sets the dies and sharpens them up; partly attends to the boys once in a while when I am out. He sees that the boys do their work, that they do their duty. He has no right to employ or discharge men or boys. I give the instructions as to what the boys are to do. Independently of me, Gus Meyer has no authority whatever." The defendant himself, after testifying that no one but he and his son, Adelbert, had the right to employ or discharge men, added: "Gus Meyer attends to the machinery and to the boys in general in the machine shop where the cans are made. * * * Gus Meyer attends to the machines to see that they run all right. He sets the dies and attends to the machinery, so it is in running order." The plaintiff's evidence further showed that, on the first of October, 1885, while the plaintiff was working at the machine, the punch suddenly fell, although the plaintiff's foot was not upon the treadle; that when it came in contact with the die it cut two fingers of the plaintiff's right hand, takihg them off, the first between the first and second joints, the second at the first joint. It was freely admitted by the plaintiff in his testimony that he understood perfectly the necessity of keeping his hands away from the die, so that they would not get caught by the descending punch, and he does not give any intelligible reason why his hand got so caught, except that the punch fell so suddenly that he did not have time to think. He said: "I did not have time to think; I pulled them (my fingers) out; I thought I could get them away from there before the die would strike the under die. * * * If I had pulled my hand out to the right, instead of to the left, I would not have been injured."

We understand that the case presents no doubt, and that there is no disagreement between the learned counsel who represent the opposing parties, down to a

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certain point. And that is this: If the plaintiff had not given evidence tending to show that Gus Meyer had, after being notified by him of the defective operation of the machine, attempted to repair the defect, and given the plaintiff assurance that he had done so, then, the plaintiff having received the injury, knowing of the defective operation of the machine, the plaintiff would have been guilty of such contributory negligence as would have barred his recovery as matter of law. With full knowledge of the danger, he would have elected to continue to use the machine. He would have proceeded as a voluntary agent, with his eyes open, and would have taken his chances. This would have precluded his right of recovery beyond any doubt.

But the evidence which the plaintiff gave, and which the jury believed, as is shown by an answer given by them to a special interrogatory, and by their general verdict under the instructions, to the effect that he had apprised Gus Meyer of the defective working of the machine, that the latter had attempted to remedy the defect, and had assured the plaintiff in substance that he had done so, and that he might thereafter continue to work it with safety, seems sufficient to take the case out of the rule which would bar a recovery on the ground of contributory negligence, unless we are wrong in one or both of the following conclusions: (1) That Gus Meyer was, in respect of the reparation of the machine, the *alter ego* of the defendant, so that this representation made by him to the plaintiff was, in contemplation of law, the representation of the defendant himself. (2) That the plaintiff who acts erroneously, in fact trusts himself into danger instead of getting out of it, under the impulse of a sudden shock or surprise produced by a catastrophe, which arises from the negligence of the defendant, is not, by reason of having so acted, conclusively to be deemed guilty of such contributory negligence as will bar his recovery of damages.

I. The evidence leaves it clear, beyond all doubt,

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that Gus Meyer was, in respect of the representation above stated, acting as the vice-principal, or *alter ego*, of the defendant, within the recent holdings of our Supreme Court on this question. He was the defendant's assistant foreman. He had, in part, at least, charge of the particular department of the defendant's work in which the plaintiff was engaged. To him was committed the care and reparation of the defendant's machinery in that department of his work. The employes of the defendant in that department of the defendant's work were under Mr. Meyer's orders. *Dowling v. Allen*, 74 Mo. 13; s. c., 88 Mo. 293; *Moore v. Railroad*, 85 Mo. 588. The last two of these cases expressly lay down the rule that the right to employ and discharge hands is no test by which to determine whether the servant in question is the vice-principal of the master, or the fellow-servant of the servant who has received the injury. The opinion of the court given by Henry, C. J., in the second case, throws the question into clear light by stating the following propositions: "That all are fellow-servants who are engaged in the prosecution of the same common work, having no dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master himself, or of some servant placed by the master over them." And on the other hand: "If a person employs another to perform a duty which he would have to discharge, if another were not employed to do it for him, such employe, as to that service, stands in the master's stead with relation to other persons." This second definition quite aptly fits the case of Meyer, as his position in the defendant's service was defined by the defendant's own evidence. Moreover, the position of Meyer in the defendant's service was, in point of fact, quite analogous to that of King in the defendant's service in the *Dowling case*, above cited, in which the supreme court, on both appeals, held that he was the defendant's vice-principal.

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The principle upon which, as we take it, all the authorities agree, is, that the master is under what may be termed an absolute duty to his servant of using care, to the end that the machinery put into the hands of his servant for use shall be reasonably safe, having regard to its nature and the purposes for which it is intended. This duty he may discharge, either by himself in person, or by a designated agent or servant. If he discharge it by an agent or servant, the latter becomes, in respect of it, his vice-principal, wholly without reference to the rank which in other respects he occupies in his master's, or principal's, service. Notice to such vice-principal in respect of a defect in a machine is, therefore, notice to his principal, and a representation made by him to a servant of his principal, that the machine may be used with safety, or is free from a given defect, is, in law, the representation of the principal himself.

II. It is a well settled and constantly recognized exception to the general rule, that the contributory negligence of the plaintiff or person injured will bar a recovery of damages for an injury, that contributory negligence is not to be imputed to the plaintiff or person injured because he has acted erroneously under the impulse of fear produced by the negligence of the defendant, although if he had acted as a man, having time to deliberate, should have acted under the circumstances, he would not have received the hurt. *Stokes v. Saltonstall*, 13 Pet. 181; *Ingalls v. Bills*, 9 Met. [Mass.] 1; *Buel v. Railroad*, 31 N. Y. 314; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *Cook v. Parham*, 24 Ala. 21, 34; *Lund v. Tyngsboro*, 11 Cush. 563; *Sears v. Dennis*, 105 Mass. 310; *Card v. Elsworth*, 65 Me. 547; *Coulter v. Express Co.*, 56 N. Y. 585. Whether the facts, which the plaintiff's evidence tended to show, warranted the extension of this principle to this case is, it may be confessed, a close question; but we incline to think that it does. It would be stating the plaintiff's evidence too

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broadly to say that it tended to show that he jerked his hand in the wrong direction through an impulse of sudden fear, when he discovered that the punch had suddenly started to fall. But we think that, under these circumstances, the physical facts of the case are evidentiary in their character, and may rightfully be considered by the jury in forming a conclusion as to the real cause of the accident. We think, moreover, that the plaintiff's counsel were entitled to argue to the jury, as they have argued to us, that the most probable theory of the accident is that a sudden contraction of the muscles of the plaintiff's arm, produced by the shock or surprise occasioned by the unexpected fall of the punch, caused his hand, instead of being withdrawn from the place of danger, to be thrust toward it. Certainly the plaintiff knew fully the danger of having his hand over the die whenever the punch should descend. He clearly understood the necessity of keeping his hand from over the die at all times. It can not be supposed that he thrust his hand into a position of danger voluntarily; and some conclusion, consistent with the evidence, and based upon the probabilities which are to be drawn from the physical facts of the case, must be drawn. We do not think that the evidence necessarily enforces the conclusion that the plaintiff held his hand carelessly in the position of danger and allowed the punch to strike it. If not, it was, under well settled principles, a question to be left to the jury, as triers of the facts.

For these reasons we hold that the court committed no error in refusing to give a peremptory instruction that the plaintiff could not recover.

III. The instructions, as a whole, submitted the case to the jury in a manner which leaves the defendant no just ground of complaint. What we have above said disposes of the principal objections which have been made to them. The second instruction given for the plaintiff, submitting to the jury, upon a hypothetical

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state of facts, the law in respect of the liability of a master to a servant for the negligence of his vice-principal, was in conformity with the decision of our Supreme Court, above quoted, and the subject needs no further comment.

IV. The court put nine special interrogatories to the jury on the motion of the defendant, which they answered categorically, Yes and No. What we have said above disposes of the objection that the general verdict of the jury was contrary to their answers to these interrogatories. It also disposes of the objection that, on the face of the petition, the plaintiff was not entitled to recover.

V. The court, at the request of the defendant, put to the jury among others the following special interrogatory: "8. Did the plaintiff inform the defendant, or the foreman in charge of the defendant's shop, of such defect in said machine, before the plaintiff was injured?" The defendant requested the court to put to the jury also the two following interrogatories which the court declined to do and the defendant excepted: "9. Whom did the plaintiff so inform? 10. What was the direct and immediate cause of the injury sustained by the plaintiff?" No precedent is cited to us to sustain the contention that the refusal to put these two interrogatories is such error as ought to work a reversal of the judgment. If the ninth interogatory had been put and the jury had answered that the plaintiff informed Gus Meyer, it would not have affected the result. Since we are of opinion, as above stated, that upon all the evidence in the case, Gus Meyer was, in respect of the transaction in question, the vice-principal of the defendant. Nor do we perceive any error necessarily prejudicial to the defendant in refusing to put the tenth interrogatory, "What was the direct and immediate cause of the injury sustained by the plaintiff?" The jury had been instructed, at the request of the defendant, that, unless the defect in the machine was the imme-

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diate and direct cause of the injury to the plaintiff, the plaintiff was not entitled to recover. The general rule is, where a substantial doubt arises as to whether the hurt was the natural and proximate, or a speculative and remote, result of the negligence which the evidence tends to show, the question is one of fact for the jury. *Dunn v. Railroad*, 21 Mo. App. 188, 198, and cases cited. The court, therefore, might well have given the special interrogatory requested; but we do not see wherein any prejudice has accrued to the defendant from its refusal to do so.

VI. The defendant put to his own witness, Mr. Meyer, assistant foreman, the following question: "Now, I will ask you to explain to the jury whether, if the machine was out of order, so that the upper die would continue to come down, or would make two strokes instead of one, without putting the foot on the treadle; whether, in that case, the machine is more or less dangerous, or any different than when the machine is in perfect order." This question was, on the objection of the plaintiff, excluded. We do not understand upon what ground this ruling of the court was made. The question is inartificially drawn, but we do not see any substantial objection to it. It called for the opinion of an expert, familiar with the machine, and possibly for some explanation which he might have been capable of making to the jury, which might or might not have thrown some light upon the subject of the inquiry. But we are equally unable to perceive any substantial prejudice to the defendant from the refusal of the court to allow it to be answered. It is to be remembered that the machine was exhibited, together with the manner of working it, to the jury. They could quite well understand, from an inspection of it, whether or not it would be more dangerous when out of order, so that the punch might descend suddenly and without warning upon the die. It seems that it was something which they could see and understand as well as Mr. Meyer, although an expert, could, and that it was

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something about which the opinion of an expert was not required, and as to which the opinion of one intelligent man in the presence of the machine would be as good as that of another. A person of the least intelligence would know that the machine was more dangerous when thus out of order than when in good order, since when in good order the operator would always know when the punch was about to descend, and when in bad order he would never know that fact. It might work perfectly for several days in succession, and then it might suddenly descend, surprising the operator, as his evidence tended to show that it did in this case.

VII. A witness for the defendant testified that he saw Gus Meyer try the machine on the morning the plaintiff was hurt. He was then asked by the defendant, "and how did it work?" To this question an objection was sustained and an exception saved. We see no prejudicial error in this ruling, since it did not appear that the time referred to was *before* the accident, and as Gus Meyer testified that he inspected the machine after the accident, and found that it worked well, it is to be inferred that this question related to that inspection. If it had reference to a point of time before the accident, it would have been material, as bearing upon the question whether the defendant had exercised reasonable care with a view of keeping the machine in a safe condition. *Flynn v. Railroad*, 78 Mo. 195, 202. But as it is not shown to have referred to such a point of time, it had no very important bearing upon the issues under inquiry, and called for an answer which was merely cumulative.

The judgment will be affirmed. It is so ordered. All the judges concur.

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BY A. MOORE BERRY.

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2. ——— DEBTOR AND CREDITOR.—Creditors are not innocent purchasers within the meaning of this rule. *Id.*

3. ——— The order of distribution in such a case, having been made after the judgment for the purchase price, it takes the place of an execution. *Id.*

COMMON CARRIERS. See NEGLIGENCE.

1. CONTRACT OF AFFREIGHTMENT—DESIGNATION OF SPECIFIC CAR. The shipper having loaded the specific car furnished him by the carrier, is not affected by the fact that a car bearing a different number was designated on the margin of the shipping contract. *Wilson v. Wabash, St. Louis & Pacific Railway Company*, 50.

2. ——— A clause in the contract which provides for notice of loss within five days after the car shall have been unloaded, has no application in a case where the freight has been delivered to a third person without the knowledge of the shipper or of his consignee. *Id.*

3. BAGGAGE—MEANING OF TERM.—What is, and what is not baggage, depends upon the circumstances of each individual case; upon the length of the journey; the purpose for which it is made; the position in life and occupation of the traveler; the mode of

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COMMON CARRIERS—Continued.

conveyance, and the character of country through which he intends to pass. Anything may be carried as personal baggage which travelers usually carry for their personal use, comfort, instruction, or amusement, having regard to the circumstances enumerated. But articles carried for sale are not baggage, without regard to what the articles may be. *Spooner v. Hannibal & St. Joseph Railroad Company*, 403.

4. DAMAGES—MEASURE OF—CASE ADJUDGED.—In this case the value of the property lost, which was baggage, with interest, was the correct measure of damages. If the property has a market value, then that is the measure, otherwise the measure is its value for use to the plaintiff. *Id.*

COMPOSITION. See DEBTOR AND CREDITOR.

CONTRACTS. See ATTORNEY AND CLIENT, 1, 2; GARNISHMENT, 1; DEBTOR; NEGOTIABLE INSTRUMENTS, 6; SCHOOLS, 2; TELEPHONE.

1. CONSIDERATION BY WAIVER.—The waiver of a legal right on the part of a promisee is a sufficient consideration for a promise made on account of such waiver. *Vogel v. Meyer*, 427.

2. CONSIDERATION RESTING ON CONVENIENCE.—Testimony from which it may legitimately be inferred that the promisor derived some benefit or convenience for his promise, furnishes evidence of a consideration to support the promise. *Id.*

3. RESCISSION—VENDOR AND VENDEE.—A vendor must exercise his right of rescission of a contract of sale for fraud on the vendee's part within a reasonable time, and he can not affirm in part and rescind in part. *Lapp v. Ryan*, 436.

4. ——— ESTOPPEL.—A vendor who has prosecuted to judgment an attachment against the vendee and his property on the ground of fraud by the vendee in making the purchase, can not assert against another attaching creditor of the vendee that the title to the property never passed to his vendee, and that the sale was rescinded prior to the adverse attachment. *Id.*

5. JURY QUESTIONS.—In actions on oral contracts the questions as to what the contract was and whether it had been violated are for the jury. *Dennis v. Crooks*, 532.

6. ELECTIONS—VOID AGREEMENTS.—A promise to pay for services rendered by another as a canvasser at a primary election to secure the promisor's nomination for an office, is unlawful and void. *Keating v. Hyde*, 555.

7. BUILDING CONTRACTS—QUANTUM MERUIT—PART PERFORMANCE.

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CONTRACTS—Continued.

A contractor can not recover on a *quantum meruit* for a part performance of a subsisting and continuing contract. *O'Brien v. Mayer*, 648.

CORPORATIONS. See EQUITY, 1.

1. STOCKHOLDERS—DIRECTORS.—A director may contract with, or lend money to, the corporation of which he is a director, though such corporation be in embarrassed circumstances at the time. *Williams v. Jackson County Patrons of Husbandry*, 132.

2. ——— TRUST FUNDS.—After the directors have officially declared their corporation insolvent and have determined to wind up its affairs with a view of paying its debts, they can not deliver its assets to one of the directors in payment of his debt to the exclusion of other creditors of equal right. *Id.*

3. ——— RIGHT OF ACTION AGAINST.—The creditor of a dissolved corporation has a statutory cause of action against a stockholder, to the extent of the latter's unpaid stock, which accrues when his right to proceed against the corporation accrues. *McGinnis v. Barnes*, 413.

4. ——— LIMITATIONS.—The capital stock being a trust fund for the benefit of creditors, a creditor of the corporation may have a subsisting cause of action against a stockholder for unpaid stock, although the corporation be barred by limitation to enforce the liability in a direct proceeding. *Id.*

5. OFFICERS—SALARY CONTRACTS.—A charter officer having been elected for one year, a resolution fixing his salary at a sum certain per month does not necessarily fix that rate for the year. *Bennett v. St. Louis Car Roofing Company*, 587.

COSTS. See ATTACHMENT, 5.

COUNTER-CLAIM.

WHEN ADMISSIBLE TO PE PLEADED.—All independent express contracts, whether liquidated, or unliquidated, are the subjects of counter-claim; and in all that class of cases in which a tort has been suffered, and the law permits the sufferer to waive the tort and sue in *assumpsit*, and he prefers the latter, then a counter-claim may be made arising under the same contract. And where the actor elects to sue in tort, springing out of a contract, pleaded as inducement, the defendant should be allowed a counter-claim growing out of plaintiff's breach of that contract. *Kamerick v. Castleman*, 481.

COURTS. See JURISDICTION.

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CRIMINAL LAW. See GAME; WITNESSES, 3.

1. DRAM-SHOPS—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION. Proof of a sale made by the clerk makes a *prima facie* case against the principal, unless he shows that the sale was made without his knowledge or authority. *The State v. Durkem*, 387.

2. ——— PRESUMPTIONS.—A defendant on trial for selling liquors without a license who fails to show that he has a license, is presumed to have none. *Id.*

CUSTODIA LEGIS. See ATTACHMENT, 3.

SEIZURES.—Personalty in custody of the law can not generally be seized under other judicial process. Exception to rule. *Bolckow Milling Company v. Turner*, 103.

DAMAGES. See JUSTICES, 1; HUSBAND AND WIFE, 2.

1. DOUBLE DAMAGES FOR KILLING ANIMALS—FAILURE OF PROOF. In an action for double damages, under the statute, for killing animals, there must be proof of actual collision between the railroad company's engine or cars and the animals. *Gilbert v. Missouri Pacific Railway Company*, 65.

2. PHYSICAL AND MENTAL SUFFERING AN ELEMENT.—The physical and mental suffering and pain of the plaintiff, consequent upon the injury, are elements properly entering into the estimation of damages. *Fell v. Rich Hill Coal Mining Company*, 216.

3. DOUBLE DAMAGES FOR KILLING ANIMALS—INFERENCES.—In an action, under the statutes, for killing animals by a railroad, where it appears that the cattle were killed at a point which the law requires to be fenced, but which was not fenced, the inference is that the stock entered upon the track at that point. *McGuire v. Missouri Pacific Railway Company*, 325.

4. EXECUTIONS.—The measure of damages in actions for property seized on execution against a third person is their value as chattels. *Stevens v. Springer*, 375.

5. HOW PROOF OF MADE.—The proof of value is generally by the judgment or opinion of witnesses. If the article has a market value, that will usually control as the best evidence of its value. If this test has been applied to it by the sale of it the fact may be proved as evidence of its value. Even the amount the goods cost is admissible, and so the amount sold for at auction has been admitted. *Id.*

6. INSTRUCTION—DEGREE OF SKILL REQUIRED BY LAW FROM PHYSICIANS.—In a suit for malpractice, for alleged unskillfulness in the treatment of the plaintiff's eye by the defendant, the court, properly instructed the jury to find whether the defendant

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DAMAGES—Continued.

held himself out as possessing a degree of skill and diligence in the treatment of the human eye as high as that possessed by other good surgeons of the specialty to which he belonged, and if they so found, and. further, that he did not exercise the skill that would ordinarily be exercised by good and careful surgeons, etc., they would find for the plaintiff. *McMurdock v. Kimberlin*, 523.

7. ELEMENTS OF MATTER OF LAW.—Where the evidence furnishes no elements for the admeasurement of damages, it is error to tell the jury that they may give such damages to the plaintiff as they may find he has suffered. *Morrison v. Yancey*, 670.

DEBTOR AND CREDITOR.

1. CONTRACTS—COMPOSITION AGREEMENT.—A composition agreement between a debtor and his creditors does not, unless it is performed, as a general rule, discharge the debtor from the residue of the debt. *Mullin v. Martin*, 537.

2. ——— Where notes are given by the debtor for deferred payments under a composition agreement, if taken by all the creditors in satisfaction of the indebtedness, their non-payment does revive the residue. *Id.*

3. COLLATERAL SECURITY.—The taking of collateral security does not suspend the action on the main debt unless it is so agreed. *Lindenschmidt v. Vallee*, 594.

DEMURRER. See PRACTICE, TRIAL, 6, 8, 10, 19.

PRACTICE.—A demurrer admits the truth of the averments of the petition and the demurrant can not afterwards claim that the facts stated are improbable. *Plant Seed Company v. Michel Plant & Seed Company*, 579.

DIVORCE.

1. HABITUAL DRUNKENNESS—OPIATES.—The statute which makes habitual drunkenness for the period of one year a ground for divorce, includes only alcoholic intoxication. *Dawson v. Dawson*, 169.

2. ——— The habitual use of opiates, whose tendency is to render the user callous, reckless, untruthful, and stupid, to cause phyical prostration, to undermine and destroy all the objects of the marital relation, and which habit is usually incurable, constitutes such indignities as furnish ground for a divorce. *Id.*

ELECTIONS. See CONTRACTS, 6.

REPEAL OF STATUTES.—The act of March 18, 1874, concerning elections, was not repealed by section 1474, of the Revised Statutes,

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ELECTIONS—Continued.

and though omitted from the revision of 1879, is still kept in force by section one of the schedule of the constitution of 1875. *Keating v. Hyde*, 555.

EQUITY. See INJUNCTION.

1. CREDITOR'S BILL — CORPORATIONS—PARTIES.—A single creditor may file a creditor's bill against the directors as trustees of a defunct corporation, without making the other creditors parties, but if the defendant director be a *bona fide* creditor the fund should be ratably distributed between him and the other creditors. *Williams v. Jackson County Patrons of Husbandry*, 132.

2. MARSHALLING ASSETS — ADMINISTRATION.—The equitable doctrine as to the marshalling of assets for the payment of the debts of decedents has no application in this state since the enactment of the statutes of administration. *McAllister v. Williams*, 286.

3. ——— ANCESTOR AND HEIR—COVENANTS—EVIDENCE—BURDEN OF PROOF.—In a suit against an heir on a covenant of his ancestor, the plaintiff must show not only that the defendant has assets by descent, but that administration on the ancestor's estate was closed prior to the beginning of the suit. *Id.*

4. ——— EVICTION.—In such an action to recover substantial damages on a covenant against incumbrances, the plaintiff must show that the incumbrance existed at the date of the covenant, and that the eviction complained of was due to such incumbrance. *Id.*

ESTOPPEL. See CONTRACTS, 4: HOMESTEAD, 4; NON-SUIT.

1. MARRIED WOMAN.—In respect of her separate property, concerning which she may make contracts, and which she may pass by parol and delivery, a married woman may create an estoppel *in pais*. *Cottrell v. Spiess*, 35.

2. DEBTOR AND CREDITOR.—To create an estoppel, the person to be estopped must have been a party to the transaction, or have knowingly received the benefits of it. *Martin v. Johnson*, 96.

EVICTION. See EQUITY, 4.

EVIDENCE. See RES JUDICATA, 1, 2, 3; NEGLIGENCE, 1; PRACTICE, TRIAL, 2; VENDOR; WITNESSES.

1. NON-EXPERT WITNESSES.—The opinion of a non-expert witness on the question of sanity must be accompanied by some of the facts upon which the opinion is based. *Turner v. Kansas City, St. Joseph & Council Bluffs Railway Company*, 13.

2. ——— Before a witness is allowed to testify upon a question of

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EVIDENCE—Continued.

sanity, it must be shown that he had had adequate opportunity of observing and of judging. *Id.*

3. HUSBAND AND WIFE.—Competency of wife as a witness. *Cottrell v. Spiess*, 35.

4. NEGOTIABLE INSTRUMENTS—CONSIDERATION.—Fraud in, or failure, or want of consideration for a negotiable promissory note may be shown by parol in an action by the payee. *Harwood v. Brown*, 69.

5. PRIVILEGED COMMUNICATIONS.—A physician is incompetent to tell indirectly what the statute forbids him to tell directly. *Streeter v. Breckenridge*, 244.

6. BEST.—The rule which requires the production of the best evidence does not require that the best witness to a fact provable by oral evidence shall be produced. *Austin v. Boyd*, 317.

7. WITNESSES—REFRESHING MEMORY.—A person who was present at an auction sale is competent to prove what occurred at the sale, although the auctioneer is not produced or his absence accounted for, and he may refresh his memory from memoranda made at the time. *Id.*

8. FOREIGN JUDGMENT.—The provisions of the federal statutes on that subject do not exclude the common law method of proving foreign judgments. *Etz v. Wheeler*, 449.

9. TELEPHONES. Evidence of an answer purporting to come from the defendant, received over wire connecting the defendant's telephone with that of the plaintiff, in response to an inquiry made through the same medium by the plaintiff, is admissible without positive proof that the defendant sent the answer. *Globe Printing Company v. Stahl*, 451.

10. BOOKS.—Book entries are not evidence in favor of the party making them, and the party's death does not change the rule. *Hensgen v. Mullally*, 613.

11. ——— This rule is not changed by the statute which makes parties competent to testify in their own behalf. *Id.*

EXECUTIONS. See ATTACHMENT, 3; CHATTELS, 1, 3; HOMESTEAD, 1, 2.

1. CLAIM OF PROPERTY UNDER SECTIONS 2366 AND 2367—EFFECT OF THE PROCEEDINGS UNDER.—The proceeding provided by the statute for the trial of the rights of property in the case of personal property seized under execution by any other than the debtor in the execution, is a judicial proceeding, and a judgment thereon is conclusive. *Stevens v. Springer*, 375.

2. ——— MAKING OF CLAIM NOT THE EXCLUSIVE REMEDY—REMEDY

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EXECUTIONS—Continued.

AGAINST SHERIFF.—A claim made under the provisions of this statute does not deprive the claimant of his remedy against the sheriff on his official bond. The statute does not purport to make this remedy exclusive of all other remedies, and resort to it is not obligatory on the claimant. *Id.*

3. ENFORCING JUDGMENT.—All courts have the power to enforce their judgments by execution unless that power be limited by statute. *Musser v. Harwood*, 495.

4. ——— Appellate courts have the power to award execution to enforce their judgments. *Id.*

EXECUTORS AND ADMINISTRATOR. See WILLS.

FORCIBLE ENTRY. See UNLAWFUL DETAINER.

1. NON LIABILITY OF SHERIFF.—An executive officer of the court is not liable in an action of forcible entry for acts committed by him while in the honest discharge of his legal duties. *Link v. Harrington*, 429.

2. BURDEN OF PROOF—ESSENTIAL EVIDENCE.—The plaintiff, in an action of forcible entry and detainer, must show that the defendant was in possession of the property at the date of the institution of the suit. *Id.*

FRAUDULENT CONVEYANCES.

1. MORTGAGES AND DEEDS OF TRUST.—A mortgage of a stock in trade is fraudulent in law as to the mortgageor's creditors, where the mortgageor, at the time, reserves the right to continue to buy and sell, and otherwise deal in the property as he had theretofore done. *Moser v. Claes*, 420.

2. GENERAL ASSIGNMENT—RIGHTS OF ASSIGNEE.—The assignee of mortgaged property occupies the former position of the assignor, and his admission that he holds the property subject to the mortgageor's rights, is not equivalent to constructive delivery of possession. *Id.*

3. DELIVERY OF POSSESSION.—The delivery of possession which will cure the fraud in a mortgage to the mortgageor's use must be actual delivery and change of possession. *Id.*

GAME.

GAME LAWS CONSTRUED.-The statute prohibiting the killing or having in possession of certain game within a given period of time, is violated by having such game in possession within the prohibited time, irrespective of the time and place of their killing. *The State v. Farrel*, 176.

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GARNISHMENT.

1. CONDITIONAL CONTRACTS—BURDEN OF PROOF.—In garnishment proceedings, in order to render the garnishee liable on a conditional promise, the plaintiff must show both the promise and the fulfillment of the condition. *Caldwell v. Silva*, 417.

2. JURISDICTION.—In garnishment proceedings, the situs of the debt determines the court's jurisdiction, and that situs is where the debtor resides; unless the debt, by the terms of the contract creating it, is payable elsewhere. *Green's Bank v. Wickham*, 663.

GUARANTY.

CONTRACT—PAYMENT OF PRICE NO WAIVER OF.—In the case of a contract of guaranty, the retaining of the property and payment of the purchase price would not affect or prevent recovery for its breach. Payment of the price is no legal waiver of the warranty. *Fadley v. Smith*, 87.

HOMESTEAD.

1. EXEMPTION—RIGHTS OF EXECUTION DEBTOR.—An officer levying an execution must give the execution debtor an opportunity to select property claimed as a homestead. *Shacklett v. Scott*, 322.

2. ——— EXECUTIONS—LEVY.—A levy of execution, where the statutory requirements as to a homestead are not substantially complied with, should be quashed. *Id.*

3. EQUITY—STATUTORY PROVISIONS.—The pleadings and the evidence must bring the case within the provisions of section 2698, Revised Statutes, before the court can make an order in equity under the provisions of the homestead act. *Fenwick v. Wheatley*, 641.

4. ——— ESTOPPEL—EXECUTION SALES.—In the absence of fraud or mistake which would entitle an execution creditor, participating in the proceeds of a sale under execution, to equitable relief, he is estopped to deny the validity of the sale on the ground that the homestead of the execution defendant was set apart on an erroneous valuation. *Id.*

HUSBAND AND WIFE. See JUSTICES, 4; MARRIED WOMEN.

1. EVIDENCE.—Acts and declarations of wife not competent, when. *Cottrell v. Spiess*, 35.

2. DAMAGES.—Where the husband is a nominal party, the action having been instituted to recover the damages sustained by the wife, the damages recoverable are the damages personal to the wife. *Brown v. The Hannibal & St. Joseph Railroad Company*, 209.

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HUSBAND AND WIFE—Continued.

3. ANTE-NUPTIAL DEBTS OF WIFE—HUSBAND'S LIMITED LIABILITY. The husband, in an action for the debts of his wife *dum sola*, is liable only to a special judgment, which must be satisfied out of property which he acquired from his wife. *Babb v. Bruere*, 604.

4. ——— PRACTICE.—A general judgment by a justice against a husband for ante-nuptial debts of his wife is irregular, and the circuit court, wherein the transcript of the judgment is filed, should recall a general execution issued thereunder, and make the judgment and the execution conform to the law. *Id.*

INJUNCTION.

1. EQUITY—TRADE NAME.—The use of a corporate name similar to that used by another corporation can not be enjoined if its adoption and use are in good faith and without fraudulent intent. *Plant Seed Company v. Michel Plant & Seed Company*, 579.

2. ——— PLEADINGS.—A petition which states that the adoption and use of the name were with the fraudulent intent of appropriating the plaintiff's trade, that the public were deceived, and the plaintiff's trade diverted to the defendant thereby, states a case for equitable relief. *Id.*

INN-KEEPERS. See LIENS, 1.

INSTRUCTIONS.

1. PRACTICE—ISSUES.—An instruction which authorizes a recovery should embrace all the issues which there is any evidence to support. *Hoffman v. Parry*, 20.

2. ——— Where instructions present questions outside of the issues tendered by the pleadings, they should be refused. *Storms v. White*, 31.

3. ——— Where an instruction submits an issue not warranted by the evidence, a verdict based on such ground should be set aside, and where the trial court should award a *venire de novo*, it ought not to let such issue go to the jury. *Cottrell v. Spiess*, 35.

4. ——— An instruction which singles out particular parts of the evidence is erroneous. *Judd v. Wabash, St. Louis & Pacific Railway Company*, 56.

5. ——— An instruction which ignores material issues is properly refused. *Martin v. Johnson*, 96; *Brown v. McCormick*, 181.

6. ——— An instruction which is correct as applied to the merits of the controversy will not be declared erroneous because it is inartificially drawn. *Sherer v. Rischert*, 275.

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INSTRUCTIONS—Continued.

7. ——— TECHNICAL WORDS.—The use of the words, "ratify" and "ratification," in an instruction, without explanation, does not render the instruction objectionable. *Young v. Crawford*, 432.

8. ——— COMMON ERROR.—A party can not complain of error in instructions which he adopted in his own. *Soldanels v. Missouri Pacific Railroad Company*, 516.

9. MUST BE RELEVANT.—Instructions which are not relevant to the issues are properly refused, notwithstanding they embody correct propositions of law. *Kauffman v. Harrington*, 572.

10. IRRECONCILABLE.—The giving of instructions covering the entire case, and which are so contradictory in part as to be irreconcilable, is error for which the judgment will be reversed. *Legg v. Johnson*, 590.

11. AMBIGUOUS. An instruction which is so ambiguous as to admit of two constructions is misleading and erroneous. *Id.*

12. PRACTICE.—Instructions as to facts not in issue are properly refused. *Larimore v. Legg*, 645.

13. ——— DEFINITIONS.—The meaning of words in ordinary, or in commercial, use, need not be defined in instructions. *Id.*

INSURANCE.

1. FORFEITURE—CONDITIONS OF—HOW CONSTRUED.—Conditions of forfeiture in insurance contracts are strictly construed. *Siebert v. Supreme Council*, 268.

2. ——— BENEVOLENT INSURANCE SOCIETIES—BURDEN OF PROOF. Under the law of a benevolent insurance association, which provides that the failure of a member to pay an assessment, after he shall have been notified in a stated manner, shall work a forfeiture of benefits, the association claiming the forfeiture must show that the member was so notified. *Id.*

3. ——— EVIDENCE—INFERENCES.—That the member of such an association, in such a case, knew of the assessment is a fact from which the jury may, but are not bound to, infer that he was properly notified. *Id.*

4. ——— BURDEN OF PROOF.—The plaintiff's right of recovery being dependent upon the fact that the deceased was a member in good standing at the time of his death, and such fact being denied by answer, the burden of proof to establish it is on the plaintiff. *Id.*

INTERPLEADER. See ATTACHMENT, 1, 2.

JUDGMENTS AND DECREES. See EXECUTION, 1; PRACTICE, TRIAL, 4.

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JUDICIAL NOTICE.

TELEPHONES.—Courts will take judicial notice that telephones have become an ordinary medium of communication and interchange of thought. *Globe Printing Company v. Stahl*, 451.

JURISDICTION. See PARTNERSHIP, 4.

1. CONSTITUTIONAL QUESTION—APPELLATE PROCEDURE.—An order of the supreme court, transferring to the court of appeals a cause theretofore sent to it on appeal from the trial court, on the ground that it involved a constitutional question, is equivalent to an adjudication that it involves no such question. *The State v. Farrell*, 176; *The State v. Kaub*, 177.

2. STATUTES—RULE AS TO RIGHTS AND REMEDIES.—Where a statute creates a right that did not exist before, and provides a remedy for the enforcement of it, that remedy must be pursued, unless the remedy given by the statute is not adequate, and not merely when it is uncertain, incomplete, or difficult. *Coates v. Acheson*, 255.

3. DEFINED.—Jurisdiction is the power to hear and determine the particular cause, and where there is jurisdiction of the person and of the subject matter, the decision of all other matters properly arising in the case is but an exercise of that jurisdiction. *Babb v. Bruere*, 604.

4. APPELLATE.—The original jurisdiction of the court of appeals are not limited by the constitutional provisions relating to their appellate jurisdiction. *The State ex rel. v. Seay*, 623.

5. PROHIBITION.—Their jurisdiction to issue a writ of prohibition is, within their territorial limits, concurrent, and their powers coextensive with the jurisdiction and powers of the supreme court. *Id.*

JURORS. See VERDICT, 7.

JUSTICES OF THE PEACE. See MECHANIC'S LIENS, 3; PARTNERSHIP, 4.

1. JURISDICTIONAL FACTS—DOUBLE DAMAGES.—In actions before justices the jurisdictional fact that the action was brought in the township in which the injury occurred, must appear affirmatively of record. *Backenstoe v. Wabash, St. Louis & Pacific Railway Company*, 148.

2. JURISDICTION—PRACTICE.—That a suit before a justice on a contract is improperly joined with one in tort, is not jurisdictional unless the aggregate of both claims exceeds the amount of the justice's jurisdiction. *Gerber v. McCoy*, 295.

3. ——— TOWNSHIP.—Where the township in which the injury

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JUSTICES OF THE PEACE—Continued.

occurred must be proved the jury are not at liberty to infer that the locality of the injury was a place in said township. *Harris v. The St. Louis, Iron Mountain & Southern Railway Company*, 328.

4. ——— HUSBAND AND WIFE.—A judgment against a husband alone in an action before a justice, in a suit against a husband and wife on a debt contracted for necessaries, is not void for want of jurisdiction. *Lindenschmidt v. Vallee*, 594.

5. JUDGMENTS—IRREGULARITY—PRACTICE.—A justice's judgment which is irregular under the conceded facts may be modified by the circuit court, wherein the transcript is filed, so as to conform it to the law. *Babb v. Bruere*, 604.

KANSAS CITY. See SCHOOLS.

LANDLORD AND TENANT.

1. REPAIRS.—In the absence of any agreement to keep leased premises in repair, a landlord is under no legal obligation to his tenant to do so. *Rogan v. Dockery*, 313.

2. CONTRACT—TENANT—NOTICE.—A tenant of a land owner is not bound by the agreement of the owner, unless he had notice of its existence. *Nolon v. Chicago & Alton Railroad Company*, 353.

3. LEASING OF LAND FOR SHARE OF CROP—EFFECT OF.—In the case of a contract for a lease of land, for a certain share of the crops to be grown upon it, it constitutes the parties to the lease tenants in common of the products of the farm, with the possession established by the relation of landlord and tenant. And the landlord has the right to enter the premises for the purpose of gathering and dividing, but not to regain possession by force or violence; and where he resorts to force he becomes a trespasser *ab initio*. *Kamerick v. Castleman*, 481.

4. FORFEITURE OF PREMISES—AFFIDAVIT.—A landlord, in bringing his action by summons for rent due and for the premises, under the statute, must, in his affidavit, state all the rent that is due, but a statement of less than is actually due will not bar his recovery. *Mooers v. Martin*, 654.

5. ——— SPLITTING DEMANDS.—The bringing of a second suit by landlord's summons for additional rent is not a waiver of rent claimed, nor of the forfeiture of the premises asserted in the first suit, but if the demands sought to be enforced existed when the first suit was begun, that may bar a recovery in the second suit. *Id.*

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LIENS. See ATTACHMENT, 3.

1. INN-KEEPERS—JURISDICTION.—A judgment declaring the indebtedness and establishing an inn-keeper's lien can be rendered only by a justice of the ward, district, or township in which the plaintiff resides. *Coates v. Acheson*, 255.

2. ——— RIGHTS AND REMEDIES.—The remedy provided for the enforcement of inn-keeper's liens is exclusive. *Id.*

3. STABLE KEEPERS.—A stable keeper, under the statute, has a lien on the animal boarded by him so long as it remains the property of the owner who contracted the debt, or of his vendee with notice. *The State ex rel. v. Shevlin*, 598.

4. ——— When the animal has been permanently removed from the stable, with or without the stable keeper's consent, the lien is lost as against those who, in good faith and without notice, obtain an interest therein. *Id.*

5. ——— EVIDENCE.—The evidence as to whether the horse was still boarding at the stable when it was mortgaged being conflicting, it is error to exclude evidence tending to show that the mortgagee acted in good faith and without notice. *Id.*

6. LIVERY STABLE KEEPERS.—A livery stable keeper's lien for keeping a horse does not depend upon his possession of the animal, but he retains, to the extent of his lien, a special property in the horse wrongfully removed from the stable, while it remains in the possession of the owner, or of one claiming under him with notice of the lien. *Heaps v. Jones*, 617.

7. ——— REMEDIES—REPLEVIN.—The statute (sect. 3197, Rev. Stat.) does not furnish the exclusive remedy where a horse upon which there is a stable keeper's lien has been wrongfully removed from the stable, but the lienor may enforce his rights in the horse by replevin. *Id.*

8. IMPLIED CONTRACTS.—The law implies a contract on the part of the owner to pay for the keeping of an animal while it is detained under valid legal process. *Id.*

LIMITATIONS. See NUISANCE, 2. BONDS, 2, 3.

1. SUSPENSION.—It is the doing of some improper act, calculated to throw the plaintiff off his guard, some act of concealment or suppression where the party ought to speak, that suspends the operation of the statute of limitations. *Hoffman v. Parry*, 20.

2. OFFICIAL BONDS.—Statute does not begin to run until, when. *The State ex rel. v. Finn*, 290.

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MALPRACTICE. See DAMAGES, 6.

MANDAMUS. See TELEGRAPH COMPANIES, 2.

MARRIED WOMEN.

1. HUSBAND AND WIFE—SEPARATE PROPERTY.—At common law, the husband may make a gift of personal property to the wife; and the purpose of the husband to create in her a separate ownership may be inferred from her long and uninterrupted control over it, with the acquiescence of the husband. *Cottrell v. Spiess*, 85.

2. ——— ESTOPPEL.—A married woman who so acts as to induce a creditor to believe that the property on which he obtains credit is his, will be estopped to assert the contrary at the suit of a creditor to subject the property to the payment of his debt. *Id.*

MASTER AND SERVANT.

1. NEGLIGENCE—RESPONDEAT SUPERIOR.—Under section five of the act approved March 23, 1881 (Sess. Acts 1881, p. 167), the term owner includes a person operating a mine under contract with the actual owner, but this will not relieve the actual owner who has assumed the burden of furnishing the operating machinery, and to this extent the relation of master and servant exists between him and an employe of the contractor. *Fell v. Rich Hill Coal Mining Company*, 216.

2. RULE GOVERNING THE RELATION.—The relation of master and servant does not cease so long as the master reserves any control, or right of control over the method and manner of doing the work, or the agencies by which it is to be effected. *Id.*

3. ACTIONS FOR VALUE OF SERVICES—WRONGFUL TERMINATION OF CONTRACT.—One hired for a period certain, and wrongfully discharged before its expiration, can not recover on the theory of constructive service for services he has never performed. His proper action is for damages caused to him by the wrongful discharge. *Bennett v. St. Louis Car Roofing Company*, 587.

4. VICE PRINCIPAL.—A person employed to perform a superintending duty which the law imposes upon the master, stands in the master's stead with relation to other servants. *Dutzi v. Geisel*, 676.

5. ——— MASTER'S DUTY—MACHINERY.—A master is under obligation to see that machinery provided for the use of his servants is reasonably safe, regard being had to its nature and purposes. *Id.*

6. ——— NOTICE.—Notice to one employed to inspect machinery, that such machinery is defective, is notice to the master. *Id.*

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M... ANIC'S LIENS.

1. PARTNERSHIP—RUNNING ACCOUNT.—The dissolution of a co-partnership breaks the continuity of a running account against it, and necessitates a new contract, express or implied, with the new firm. *Henry v. Mahone*, 83.

2. ——— SEPARATE CONTRACTS.—Work and materials having been done and furnished under separate contracts the lien claims must be filed separately under such contracts, and not joined in one account. *Id.*

3. MECHANIC'S LIENS—JUSTICES—INARTIFICIAL STATEMENT.—A statement, in a suit before a justice to enforce a mechanic's lien, will support a lien judgment, if it contains the necessary jurisdictional averments, although it be inartificially drawn. *Schluter v. Wiedenbrocker*, 440.

4. SUB-CONTRACTORS—NOTICE.—It is essential to a sub-contractor's recovery against the contractor and the owner, that he should show service, upon the owner, of notice of his intention to file a lien within the time required by statute, and the owner's absence from the state will not excuse a failure to do so. *Hewitt v. Truitt*, 443; *Doyle v. Truitt*, 448.

5. ——— LIEN ACCOUNTS.—A lien is not vitiated because the account filed by a sub-contractor includes charges for work not included in the contract, but which would be a proper subject of lien if included in the contract, where the improper items are severable from the other parts of the account. *Johnson v. Barnes*, 546.

6. ——— AGENCY—NOTICE OF LIEN.—A resident person, who is charged by a non-resident owner with the duty of approving all bills or demands prior to their payment, is the owner's agent, and service on him of notice of intention to file a lien is sufficient, under the statute. *Id.*

MISDEMEANORS. See APPEALS.

MORTGAGES AND DEEDS OF TRUST. See FRAUDULENT CONVEYANCES.

ILLEGALITY OF—DEBTOR AND CREDITOR.—The taking possession by the mortgagee of mortgaged property under a mortgage, good *inter partes*, but invalid as to the the mortgageor's creditors, cures the defects of the mortgage, if such possession is taken before the mortgageor's creditors have acquired rights in the property. *Wood v. Hall*, 110.

MUNICIPAL CORPORATIONS. See TELEGRAPH COMPANIES, 2.

1. SIDEWALKS—REPAIRS OF—NEGLIGENCE.—Municipal corporations

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MUNICIPAL CORPORATIONS—Continued.

are obliged to keep in repair the sidewalks, although the same may have been constructed by a third person. *Streeter v. City of Breckenridge*, 244.

2. ——— INSTRUCTIONS.—The question whether, when a part of the sidewalk is defective through negligence, the other part, which is not defective, is reasonably safe, sufficient, and convenient for public travel, is one of fact for the jury. *Id.*

NELIGENCE. See JUSTICES, 1; MASTER AND SERVANT, 1; MUNICIPAL CORPORATIONS, 1, 2.

1. DAMAGES — CARRIERS — EVIDENCE — ORDINANCES.—A municipal ordinance, though not specifically pleaded, is admissible in evidence as bearing on the question of negligence, in actions for damages for negligence against a common carrier. *Judd v. Wabash, St. Louis & Pacific Railway Company*, 56.

2. ——— Negligence in killing an animal which has come upon a railroad track at a point where it is not required to be fenced, and which is not a public crossing, can not be imputed to the railroad company until the animal has so entered upon the track. *Id.*

3. ——— There can be no recovery in such a case unless the defendant could, after having seen the animal upon the track, have, by reasonable exertion, avoided the injury. *Id.*

4. ——— PRIMA FACIE CASE.—Evidence sufficient to warrant the jury in finding that the plaintiff's cow was struck by the defendant's train is not sufficient to support a verdict for the plaintiff. *Flannery v. Kansas City, St. Joseph & Council Bluffs Railway Company*, 120.

5. ——— CITY ORDINANCES. — The violation of a valid city ordinance by running a train at a prohibited rate of speed, is negligence, and creates a liability for any injury caused by the train while running at the prohibited rate of speed. *Backenstoe v. Wabash, St. Louis & Pacific Railway Company*, 148.

6. ——— The imposition of a fine for a violation of such an ordinance does not relieve the violator from his pecuniary liability for injuries resulting from such violation. *Id.*

7. ——— PRACTICE.—In actions for damages caused by negligence the question of negligence is for the jury, under the evidence. *Id.; Fell v. Rich Hill Coal Mining Company*, 216.

8. RAILROADS—PRACTICE.—In an action against a railroad company for damages for killing cattle at a point not on, or in the immediate vicinity of, a public road crossing, but at a point where the

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NEGLIGENCE—Continued.

railroad company is not required to fence its right of way, the plaintiff must show that the defendant's negligence was the cause of the accident. *Long v. St. Louis, Keokuk & Northwestern Railway Company,* 178.

9. ——— FAILURE OF PROOF.—In such a case, evidence of a failure to ring the bell or blow the whistle in approaching a public road crossing at a considerable distance from the place of the accident is not such proof of negligence as will warrant a verdict for the plaintiff. *Id.*

10. CONTRIBUTORY—MUST BE RAISED BY PLEADING AND INSTRUCTIONS. In order that a defendant may avail himself of the defence of contributory negligence, it should be raised by the pleadings and presented to the jury by instructions. *Fell v. Rich Hill Coal Mining Company,* 216.

11. ——— STOCK RUNNING AT LARGE.—It is not contributory negligence to permit stock to go at large in the vicinity of a railroad. *Nolon v. Chicago & Alton Railroad Company,* 353.

12. CASE ADJUDGED.—A case where the court, after examination of the evidence in the record, refuses to take the case away from the jury, on the claim that the plaintiff's negligence directly contributed to his misfortune. *Crow v. Wabash, St. Louis & Pacific Railway Company,* 357.

13. ——— A case in which it is held that negligence was not imputable to the engineer of a locomotive railroad engine until after he actually discovered the peril of the person on the railroad track. *Id.*

14. WHETHER BEING ON THE CAR PLATFORM IS.—It is not negligence, as a matter of law, for a passenger to be or remain on the platform of a car for a time, though there be seats inside, in the absence of a law or regulation against it. But it is proper, in such a case, for the court to submit to the jury, whether under all the circumstances, the plaintiff was in the exercise of due care, when he met with the accident. *Gerstle v. Union Pacific Railway Company,* 361.

15. HIRING OF MINOR—RULE CONCERNING.—The general rule of law is that a person hires a minor at his peril. It is his duty to ascertain the legal *status* of the child, and if he neglects to do so, the fault, as well as the consequences, is his own. *Soldanels v. Missouri Pacific Railway Company,* 516.

16. CONTRIBUTORY—REASONABLE CARE.—An act which a careful person would ordinarily avoid may not be negligent when done under the impulse of sudden fear or surprise. *Dutzi v. Geisel,* 676.

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NEGOTIABLE INSTRUMENTS. See BILLS OF EXCHANGE; VENDOR, 1.

1. ALTERATIONS.—Generally, the holder of negotiable paper which has been altered so as to increase the maker's liability thereon, can not recover against the maker. *Scotland County National Bank v. O'Connel*, 165.

2. ——— The makers of a negotiable note having delivered it to their co-maker in a condition which enables him to fill blank spaces without changing the appearance of the paper as a genuine instrument, are liable thereon to the purchaser in good faith, notwithstanding the alteration. *Id.*

3. PROMISSORY NOTES—PAYMENT.—It appearing that the only parties interested in a note did not intend its transfer to operate as a payment thereof, and that the rights of third persons were not thereby affected, such transfer will not be held to have been a payment. *Watson v. Walther*, 263.

4. HOLDER FOR VALUE—BAD FAITH.—The question of negligence in the purchase of negotiable paper for value before maturity, is material only as bearing on the question of bad faith in making the purchase. *Cloud v. International Book & News Company*, 319.

5. PRESUMPTIONS—BURDEN OF PROOF.—The transferee of negotiable paper before maturity, is presumed to have acquired it in good faith, and the burden is on him who claims the contrary. *Id.*

6. ALTERATION—EFFECT OF—RATIFICATION.—Where in the case of a written order, a blank space was filled by the payee, after its acceptance and without the knowledge or consent of the acceptor, but with the knowledge of plaintiff, this was such an alteration as rendered the acceptance void, unless, with knowledge thereof it was *afterwards* ratified. Evidence to the fact of ratification is for the jury. *Lammers v. White Sewing Machine Company*, 471.

7. PROMISSORY NOTE—CONSIDERATION.—In an action on a promissory note by the payee against the maker, proof that the note was given in part payment of expenses incurred in defending persons charged with crimes, does not make out the defence of illegal consideration. *Hutchinson v. Dornin*, 575.

8. ——— The consideration of the note being contested, an admission by the maker that he was indebted to the payee, coupled with a denial that the note was given on account of such indebtedness, will not authorize the court to render a judgment for the payee as a matter of law. *Id.*

NEW TRIAL. See PRACTICE, TRIAL, 18, 22, 23, 26.

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NON-SUIT.

ESTOPPEL.—A non suit, whether voluntary or enforced, does not estop the plaintiff from bringing a new action. *National Water Works Company v. School District*, 227.

NUISANCE.

1. PLEADINGS—NOTICE.—In an action for a nuisance erected by the defendant's predecessor it is necessary to allege that the defendant had either knowledge or notice of the nuisance. *McGowan v. Missouri Pacific Railway Company*, 203.

2. LIMITATIONS.—A nuisance is a continuous thing, and as such, is a fresh nuisance every day it is suffered to remain unabated; and though the party complaining can not recover upon the original cause of action, after the period of bar prescribed by statute, he may for its continuance, at any time before the right of entry is barred, recover such actual damage as has accrued within the statutory period. *Id.*

PARENT AND CHILD.

WHAT CONSTITUTES EMANCIPATION—ESTOPPEL.—The consent of a parent that his minor child may work and receive pay for himself, is but a license, revocable at will, as between him and the child. It is only when the implied emancipation has been acted upon by some third party, dealing with the child in good faith, that the parent will be estopped to assert his customary right against such third person. *Soldanels v. Missouri Pacific Railway Company*, 516.

PARTIES. See ATTACHMENT, 4.

PARTNERSHIP.

1. DISSOLUTION—RUNNING ACCOUNT.—The dissolution of a co-partnership by the retirement of one partner breaks the continuity of a running account against it, and necessitates a new contract, express or implied, to establish a running account as against the new firm. *Henry v. Mahone*, 83.

2. AUTHORITY OF MEMBER AS TO SIGNING OF NOTE, ETC.—A member of a trading partnership is authorized to sign the firm name to a note in the usual course of business. And the presumption is that all paper upon which the signature of a trading firm has been put by a partner, is the paper and bears the signature of the partnership. *Feurt v. Brown*, 332.

3. SETTLEMENT OF ACCOUNTS—ACTION BY PARTNER.—When there has not been a settlement of accounts, and a balance ascertained, one partner can not maintain *assumpsit* against another, but if

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PARTNERSHIP—Continued.

only one item of the partnership remains to be liquidated, such action will lie. *Id.*

4. JURISDICTION—JUSTICES.—A justice of the peace has no jurisdiction of an action by one partner against his co-partner in respect of partnership matters prior to a settlement between them. *Newberger v. Friede*, 631.

5. NECESSARY CONSTITUENTS.—Mere participation in profits and losses does not necessarily create a partnership; but there must be such a community of interest as enables each party to make contracts, incur liabilities, manage the business, and dispose of the whole property. *Id.*

PLEADINGS. See NUISANCE, 1; ATTACHMENT, 6.

1. DEFECTIVE PETITION GOOD AFTER VERDICT.—A defective statement of a cause of action is good after verdict. *Mace v. Vendig*, 253.

2. SLANDER—DENIAL AND JUSTIFICATION NOT INCONSISTENT PLEAS. In actions for slander, pleas of denial and justification are not inconsistent. *Wood v. Hilbish*, 389.

3. ALTERNATIVE PLEAS.—In pleading statements in the alternative, each of the alternatives must state a legal cause of action or defence, and if either of the statements is insufficient in law the entire plea is defective. *Hewitt v. Truitt*, 443; *Doyle v. Truitt*, 448.

4. JURISDICTION, HOW PLEADED.—It is sufficient, under the statute, in pleading the judgment of a court of special jurisdiction, to state that jurisdiction has been duly conferred, without stating the facts. *Etz v. Wheeler*, 449.

PRACTICE, APPELLATE. See JURISDICTION, 1.

1. EXCEPTIONS.—Errors occurring at the trial will be reviewed on appeal only on bill of exceptions. *Spurgeon v. West*, 42.

2. TRANSCRIPT—ABSTRACT.—Rule fifteen of the Kansas City Court of Appeals construed. *Goodson v. Wabash, St. Louis & Pacific Railway Company*, 76.

3. TRANSFER OF CAUSE TO SUPREME COURT.—A cause can not be transferred to the supreme court by the courts of appeals unless the decision of the latter court therein is in conflict with the last ruling of the supreme court on the question involved. *Wood v. Hall*, 110.

4. ABSTRACT AND TRANSCRIPT—VARIANCE.—The Kansas City Court of Appeals will not, where the appellant has filed an abstract of

PRACTICE, APPELLATE—Continued.

the record and the respondent has not filed any additional abstract, look to the transcript to ascertain the correctness of the abstract. *Flannery v. Kansas City, St. Joseph & Council Bluffs Railway Company*, 120.

5. OBJECTIONS TO EVIDENCE.—Objections to the introduction of evidence made in the court below, but not presented on appeal, will be considered as having been abandoned. *Backenstoe v. Wabash, St. Louis & Pacific Railway Company*, 148.

6. ——— Objections to the introduction of evidence, made for the first time on appeal, are of no avail. *Id.*

7. AFFIRMANCES.—Where it clearly appears, from the obvious, admitted, and found facts that the verdict is for the right party, the judgment will not be disturbed because of the giving of erroneous instructions. *Scotland County National Bank v. O'Connel*, 165.

8. ASSIGNMENT OF ERRORS.—In the absence of a formal assignment of errors, and where the appellant's brief assigns but one error, the appellate court will determine only the question raised by such assignment of error. *Wheeler v. Metropolitan Manufacturing Company*, 190.

9. ——— EXCEPTIONS.—Instructions will not be reviewed on appeal where the record does not show that exceptions were saved to the giving thereof. *Id.*

10. EVIDENCE.—The admission of evidence which could not prejudice the appellant is not ground for reversing the judgment. *Moffet v. Turner*, 194.

11. IMPERFECT RECORD.—Appellate courts will, upon suggestion, by the issuance and enforcement of all necessary remedial writs, aid either party to perfect an imperfect transcript of the record. *Dameron v. Harvey*, 197.

12. ——— CLERK'S NEGLIGENCE—APPELLANT LIABLE FOR.—An appellate court having exhausted its powers, and, owing to the circuit clerk's negligence, the record still remaining so confused and unintelligible that the cause can not be reviewed under the rules applicable to appellate procedure, the judgment will be affirmed. *Id.*

13. ——— AGENCY.—The circuit clerk is, in contemplation of law, the agent of the appellant or the plaintiff in error, who must suffer the consequences of his negligence. *Id.*

14. CHANGE OF THEORY.—Parties are, on appeal, bound by the theory, as shown by the evidence and instructions, upon which the cause was tried. *Fell v. Rich Hill Coal Mining Company*, 216.

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PRACTICE, APPELLATE—Continued.

15. IRRELEVANT TESTIMONY.—The admission of irrelevant testimony, not submitted to the jury by instructions and not otherwise prejudicial to the appellant, is not ground for reversing a judgment. *Siebert v. Supreme Council*, 268.

16. WEIGHT OF EVIDENCE.—In actions at law, appellate courts will not weigh the evidence where there is substantial evidence to support the verdict. *Sherer v. Rischert*, 275.

17. MOTIONS—NEW TRIAL—ARREST OF JUDGMENT.—A motion for a new trial, filed after a motion in arrest of judgment has been overruled, will not authorize an appellate court to review matters of exception saved at the trial. *Carrington v. Hancock*, 299.

18. EXCEPTIONS—EVIDENCE—NON-SUIT.—A general statement, following a detailed statement of the evidence in a bill of exceptions, that there was oral evidence tending to support the instructions given, is conclusive against a claim that the plaintiff should have been non-suited for want of evidence showing a right of recovery, if the hypothetical facts stated in the instructions show a legal right of recovery. *Rogan v. Dockery*, 313.

19. EFFECT OF REVERSING AND REMANDING.—Where a cause is reversed and remanded by the appellate court, with directions as to the further proceedings of the trial court, it is out of the power of the lower court to open the cause and have a new trial. *Connor v. Pope*, 344.

20. MOTION FOR NEW TRIAL—EXCEPTIONS.—It is essential that the bill of exceptions preserve the motion for a new trial where the matters sought to be reviewed on appeal are matters of exception. *Furber v. Conway*, 412; *McMurdock v. Kimberlin*, 523.

21. CONCLUSIVENESS OF FINDINGS.—The findings of fact are conclusive, where no instructions are asked or given, and where there is substantial evidence to support such findings. *Schluter v. Wiedenbrocker*, 440.

22. EVIDENCE—INCOMPETENT TESTIMONY.—The admission of incompetent testimony to prove a fact, is not ground for a reversal of the judgment, where the evidence of the complaining party fully established such fact. *Id.*

23. AFFIRMANCE.—Judgments will be affirmed on appeal where no abstract of the record, assignment of errors, or briefs are filed. *The State v. Whitten*, 459.

24. TRIAL BY COURT—INSTRUCTIONS.—Where the case is tried by the court, without the intervention of a jury, this court will pay but

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PRACTICE, APPELLATE—Continued.

little regard to the action of the court in giving or refusing declarations of law, except in so far as they indicate the theory upon which the court tried the case. *The State ex rel. v. Shobe*, 474.

25. EFFECT OF REVERSAL.—A reversal of the judgment is a final determination of the cause. *Musser v. Harwood*, 495.

26. ——— EXECUTIONS.—Appellate courts may award execution to enforce their judgments. *Id.*

27. WEIGHT OF EVIDENCE.—An appellate court will not vacate a verdict, supported by substantial evidence, on the ground that the opposing evidence greatly preponderates. *Johnson v. Barnes*, 546.

28. REVIEW—EXCEPTIONS—MOTION FOR NEW TRIAL.—Appellate courts will not review objections made at the trial unless proper exceptions are saved at the time and by motion for a new trial. *Kauffman v. Harrington*, 572.

29. AFFIRMANCE WITH DAMAGES.—A judgment on a money debt admitted to be due will be affirmed with damages unless the appeal shows substantial merit. *Lindenschmidt v. Vallce*, 594.

30. IMMATERIAL ERRORS.—If, upon the undisputed evidence, the plaintiff is entitled to the judgment rendered, errors in the giving or refusal of instructions is not ground for reversing the judgment. *Newberger v. Friede*, 631.

31. ——— A finding of the court, which is consistent with any theory under the proof, will not be vacated on appeal where no instructions are asked or given, and where the court has not erred in excluding competent evidence. *Green's Bank v. Wickham*, 663.

32. AFFIRMANCE WITH DAMAGES.—In an action on a written promise to pay, an appeal which brings up for review questions of fact only will not be considered as having merit, and the judgment will be affirmed with ten per cent. damages. *Osborne v. Oliver*, 667.

33. JURY—SPECIAL QUESTIONS.—The court's refusal to submit certain specific questions to the jury is not ground for reversing the judgment, where it does not appear that their refusal was prejudicial to the party asking them. *Dutzi v. Geisel*, 676.

PRACTICE, TRIAL. See VERDICT; NON-SUIT; AMENDMENT; DEMURRER.

1. PLEADINGS—GENERAL ISSUE.—Under the general issue the defendant may prove any fact which goes to show that the plaintiff never had a cause of action against him. *Hoffman v. Parry*, 20.

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PRACTICE, TRIAL—Continued.

2. ——— In some cases the defendant is entitled to make any proof which includes a fact within the terms of the allegations necessary to support the plaintiff's case. *Id.*

3. INSTRUCTIONS.—In actions at law, questions of law can be raised at the trial only by instructions. *Spurgeon v. West*, 42.

4. JUDGMENTS—SATISFACTION OF—MOTIONS.—A motion to satisfy a judgment on the ground that a third person is interested in it, and has a right to collect it, should be denied. *Lowe v. Smith*, 44.

5. TRANSCRIPT—ABSTRACT.—Rule fifteen of the Kansas City Court of Appeals construed. *Goodson v. Wabash, St. Louis & Pacific Railway Company*, 75.

6. DEMURRER AFTER ANSWER.—It is not error to strike from the files a demurrer, filed while the trial was pending, and without leave, and after answer had been filed. *Fadley v. Smith*, 87.

7. MISJOINDER.—A misjoinder of causes of action can not be taken advantage of by a motion in arrest of judgment. *Id.*

8. ——— DEMURRER is the proper method of raising the question of improper joinder in the same count, of causes of action which can not be joined in the same petition, but to be of avail must be filed before the trial. *Id.*

9. ARREST OF JUDGMENT— PLEADINGS.—The same cause of action being stated in different forms, in each of two counts of the same petition, the finding of the jury, under the court's instructions as to one count, ignoring the other, is not ground for sustaining a motion in arrest of judgment. *Moffett* v. *Turner*, 194.

10. DEMURRER TO EVIDENCE.—In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence, which a jury might, with any degree of propriety, have inferred in his favor. *Fisher v. Missouri Pacific Railway Company*, 201.

11. ——— INSTRUCTIONS. — Where the facts in evidence are submitted to the jury by proper instructions, and the evidence justifies the issues submitted by the instructions, the finding of the jury is binding upon this court. *Brown* v. *Hannibal & St. Joseph Railroad Company*, 209.

12. VERDICT FOR THE RIGHT PARTY—RULE CONCERNING.—Where the verdict is for the right party, and could not have been otherwise, except through a disregard of the evidence by the jury, the verdict will not be disturbed, although there may have been error committed at the trial touching some other matter not essential to a recovery. *Fell* v. *Rich Hill Coal Mining Company*, 216.

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PRACTICE, TRIAL—Continued.

13. FAILURE OF PROOF.—A judgment for the defendant will not be disturbed where there is a failure of proof of facts essential to the plaintiff's recovery. *McAllister* v. *Williams*, 286.

14. APPEALS—DISMISSAL OF PART OF CAUSE OF ACTION.—On appeal from a justice, the plaintiff may dismiss a part of his cause of action, notwithstanding the statute which requires that the same case which was tried before the justice shall be tried on appeal. *Gerber* v. *McCoy*, 295.

15. CONTINUANCE.—An application for continuance, on the ground of the absence of a party who is a material witness in his own behalf, stands on the same footing as one made on account of the absence of any other material witness. *Id.*

16. ——— The necessary absence of a party to a suit gives him no legal right to have his suit continued for that reason alone. *Id.*

17. DEFECTS CURED BY VERDICT.—If the petition states facts essential to the plaintiff's recovery, defects in its form are cured by verdict, and can not be reached by a motion in arrest of judgment. *Carrington v. Hancock*, 299.

18. ——— MOTION FOR NEW TRIAL ERRONEOUSLY ENTITLED.—It is immaterial that a motion for a new trial was, by mistake, endorsed with an erroneous title. *Harris v St. Louis, Iron Mountain & Southern Railway Company*, 328.

19. DEMURRER TO EVIDENCE—DUTY DEVOLVING ON COURT.—In passing on a demurrer to the evidence the court is not at liberty to make inferences of fact in favor of the defendant, to countervail or overthrow either presumptions of law or inferences of fact in favor of the plaintiff. *Feurt v. Brown*, 332.

20. JUDGMENTS—SUBSEQUENT PLEADING.—It is error to permit a supplemental answer to be filed after judgment without setting the judgment aside. *Murphy* v. *DeFrance*, 337.

21. DUTY OF COURT WHERE FACTS ARE UNDISPUTED.—Where the facts are undisputed or clear the court should apply the law and determine the case. *Powell* v. *Powell*, 365.

22. NEW TRIAL.—Where the verdict is without evidence to support it the trial court should grant a new trial. *Spooner* v. *Hannibal & St. Joseph Railway Company*, 403.

23. ——— A motion for a new trial is no part of the record until made so by a bill of exceptions which must show the date and the filing of the motion. *Demske* v. *Hunter*, 466.

24. ——— A recital of the rendering of a verdict and the statement that "thereupon" the defendant filed the motion for a new trial, is insufficient. *Id.*

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PRACTICE, TRIAL—Continued.

25. ——— RECORD OUTSIDE OF BILL.—Notwithstanding the record, outside of the bill of exceptions, may show the filing of the motion for new trial, it must appear in the bill that it was filed within four days. *Id.*

26. EXCEPTIONS, WHEN WAIVED.—All exceptions not brought to the attention of the trial court in a motion for a new trial are deemed waived. *The State ex rel.* v. *Shobe*, 474.

27. QUESTIONS OF FACT.—Questions as to what the oral contract was and whether it had been violated are for the jury. *Dennis* v. *Crooks*, 532.

28. PARTIES TO SUIT ON ASSIGNED DEMAND.—The assignor of a demand transferred pending a suit thereon may prosecute the action to final termination *Green's Bank* v. *Wickham*, 663.

PRINCIPAL AND AGENT.

SUB-AGENT—RELATION TO JOINT PRINCIPALS.—A sub-agent employed by one of two joint principals, of which the other is informed, is as much the agent of the latter as of the former. *Hoffman v. Parry*, 20.

PRINCIPAL AND SURETY. See BONDS; REPLEVIN, 2.

PROHIBITION. See JURISDICTION, 4, 5.

1. PARTIES.—The state is not a necessary party to a writ of prohibition, though the writ may be prosecuted in the name of the state. *The State ex rel. v. Seay*, 623.

2. ——— The writ of prohibition is not one of right, and the fact that its issuance may, by arresting the further progress of a cause, deprive the supreme court of its exclusive appellate jurisdiction in a given case, will be considered by the court of appeals in determining whether it will issue the writ. *Id.*

3. JURISDICTION.—Where the jurisdiction of a court depends upon the findings as to contested facts, the decision of such facts, for the purpose of determining the question of jurisdiction, is, *prima facie*, a proper exercise of judicial power, and unless the remedy, by appeal, of the party aggrieved, is wholly inadequate, and the facts call for immediate relief, appellate courts should not issue a writ of prohibition to arrest further action in the cause. *Id.*

RAILROADS. See NEGLIGENCE.

REPLEVIN. LIENS, 7.

1. STRAYS.—The owner of cattle taken up and posted may recover them in replevin where the defendant fails to plead and prove that they had broken over or through a lawful fence. *Storms v. White*, 31.

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REPLEVIN—Continued.

2. ACTION ON BOND—The cause having been dismissed because of the plaintiff's failure to give an additional replevin bond, and an assessment of damages on the bond having been prevented by the plaintiff's conduct, such failure of assessment will not prevent the defendant from maintaining an independent action on the bond against the plaintiff and his sureties. *Morrison v. Yancey*, 670.

RES JUDICATA.

1. PAROL EVIDENCE.—It may be shown by parol that questions which *prima facie* appear to have been adjudged in a former suit were not in fact determined. *Lightfoot v. Wilmot*, 5.

2. ——— It may be shown by parol that the finding was upon one rather than another issue, where several issues are presented and the finding upon any one would warrant the verdict and judgment. *Id.*

3. ——— PRESUMPTIONS.—The presumption that matters which could have been proved in a former action were proved may be rebutted. *Id.*

4. ——— In an action to recover the amount of a note and the expense incurred in foreclosing a mortgage securing it, on the ground that the note had been paid prior to the sale of it by the defendant to the plaintiff, it is not error to exclude evidence tending to show that in a former suit, to which the defendant was not a party, and wherein he had no opportunity to defend, the court had adjudged that the note had been paid. *Watson v. Walther*, 263.

SCHOOLS.

1. KANSAS CITY.—The school district of Kansas City is a corporation independent of the municipal corporation of Kansas City *National Water Works Company* v. *School District*, 227.

2. ——— CONTRACTS.—The school district of Kansas City takes no benefit by a contract that the plaintiff shall furnish water free of charge "for all public buildings and offices of said city." *Id.*

SHERIFF. See BONDS.

SLANDER. See PLEADINGS, 2.

1. PROOF OF SPEAKING THE WORDS CHARGED, OR THEIR EQUIVALENT, REQUISITE.—Where the speaking of the words charged is at issue under the pleadings, it devolves upon the plaintiff to prove the

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SLANDER—Continued.

speaking of the words charged, or of such of them as contained the precise charge of slander averred. Proof of other words of substantially the same meaning as the words charged, is not sufficient. *Wood* v. *Hilbish*, 389.

2. ——— WORDS NOT ACTIONABLE PER SE—AVERMENT OF EXTRINSIC FACTS, WHEN NECESSARY.—Where the words spoken are not actionable *per se*, and extrinsic facts make them such as to impute crime, it is necessary, by prefatory averments, to set out in the petition the extrinsic facts. It is not sufficient to make these facts appear by *innuendo*; for it is not the office of the *innuendo* to make averments, but to apply the words or explain their meaning. *Id.*

3. ——— WORDS ACTIONABLE PER SE—PROOF OF MALICE NOT NECESSARY—DAMAGES.—Where words spoken are actionable *per se* the law implies malice, and it is not necessary for the plaintiff to prove malice; and the plaintiff is entitled to recover as damages a fair and reasonable compensation for the injury naturally and probably done to him thereby, whether the defendant spoke the words with malice in fact or not. And, without proof of actual malice, the jury are at liberty to give the plaintiff such exemplary damages as they may believe it properto impose as a punishment on the defendant. *Id.*

SPECIAL TAXES.

1. ASSESSMENTS.—The assessment of special taxes on property benefitted by street improvement is an exercise of the taxing power. *Allen* v. *Krenning*, 561.

2. ——— LIMITATIONS.—The provision of the charter of the city of St. Louis, limiting assessments for special taxes to twenty-five per cent. of the assessed value of the property, is in the nature of a tax exemption, and must be strictly construed. *Id.*

3. ——— This limitation refers to each distinct improvement, and not to the aggregate of all street improvement, which may be chargeable against the property. *Id.*

4. ——— INTERSECTING STREETS.—A lot at the intersection of two streets may be assessed to an amount not to exceed twenty-five per cent. of its assessed value, for the improvement of each street, though the improvements are of the same character, and made at substantially the same time. *Id.*

SPECIAL VERDICT. See VERDICT; PRACTICE, APPELLATE, 32.

STABLE KEEPERS. See LIENS.

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STATUTE OF FRAUDS.

1. SUFFICIENT MEMORANDA.—"Sold notes" constitute sufficient memoranda under the statute of frauds, although they omit to state the time of delivery of the goods sold. *Greeley-Burnham Grocer Company v. Capen*, 301.

2. ——— Under the statute of frauds, the contract need not be in one writing, but it may be established by the letter correspondence between the parties. *Id.*

3. PART PERFORMANCE.—Under evidence tending to show a contract for the sale of a lot of tobacco, it is error to non-suit the plaintiff who seeks to enforce the contract, although there is no written memorandum of the sale signed by the defendant, where a part of the tobacco has been delivered. *Austin* v. *Boyd*, 317.

STATUTES. See JURISDICTION, 2.

RE-ENACTMENT—CONSTRUCTION OF.—Words used in a statute will be construed with reference to their generally accepted meaning at the time of the passage of the act, there being no presumption that the legislature in re-enacting the statute intended that the words should have an enlarged meaning. *Dawson v. Dawson*, 169.

STOCKHOLDERS. See CORPORATIONS.

STRAYS.

CONSTRUCTION OF STATUTE.—To justify the taking up and posting of cattle they must have broken over or through a lawful fence. *Storms v. White*, 31.

STREETS. See MUNICIPAL CORPORATIONS.

TELEGRAPH AND TELEPHONE COMPANIES. See TELEPHONE.

1. TELEPHONE COMPANIES—RIGHTS AND LIABILITIES.—Telephone companies organized under the laws of this state may set their poles along the public streets of cities, subject to regulation by ordinance as to the location and kind of posts, piers, and abutments, and the height of the wires. *The State ex rel. v. Flad*, 185.

2. ——— MANDAMUS—ST. LOUIS—LIMITATION OF POWERS.—The board of public improvements of the city of St. Louis can not impose conditions other than those imposed by statute and ordinance upon telephone companies, and where such companies have complied with all the lawful requirements, the board will be compelled by mandamus to issue a permit for the erection of poles on the streets. *Id.*

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TELEPHONES. See TELEGRAPH.

1. EVIDENCE—JUDICIAL NOTICE.—Courts will take judicial notice that telephones have become an ordinary medium of communication and interchange of thought. *Globe Printing Company v. Stahl*, 451.

2. ——— Evidence of an answer purporting to come from the defendant, received over wire connecting the defendant's telephone with that of the plaintiff, in response to an inquiry made through the same medium by the plaintiff, is admissible without positive proof that the defendant sent the answer. *Id.*

TITLE.

1. SUIT TO QUIET—ISSUES—POSSESSION.—In a proceeding under the statute to quiet title, where the answer is a general denial, the issue of the plaintiff's possession is the only issue under the pleadings. *Murphy v. DeFrance*, 337.

2. ——— Where the defendant claims title to the land, the statute provides that "he shall by answer show cause why he should not be required to bring an action and try such title," and unless this is done the existence of such cause is not in issue. *Id.*

TRESPASS. See LANDLORD, 3.

ULTRA VIRES. See TELEGRAPH COMPANIES, 2.

UNLAWFUL DETAINER. See FORCIBLE ENTRY.

1. POSSESSION—ABANDONMENT.—In an action of unlawful detainer in which the only question is whether the defendant's conceded prior possession had been abandoned before the plaintiff's entry upon the land, the question of abandonment is one of fact. *Brown v. McCormick*, 181.

2. ——— INSTRUCTIONS.—In such a case, where there is substantial evidence of the lawfulness of the defendant's possession at the time when the suit was brought, the facts being controverted, an instruction founded on the plaintiff's testimony, and ignoring countervailing facts proved by the defendant, is erroneous. *Id.*

VENDOR AND VENDEE. See CHATTELS, 1, 3; CONTRACTS, 3, 4.

COVENANTS OF WARRANTY—CONSIDERATION.—The grantee in a deed which conveys an unknown, uncertain, and undetermined interest in land may prove total failure of consideration in an action on the notes given for the purchase money. *Lewis v. West*, 503.

VERDICT. See PRACTICE, APPELLATE, 33.

1. SPECIAL.—Section 2639, of the Revised Statutes, only intends that

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VERDICT--Continued.

issues in the cause, and not particular facts, shall be submitted to the jury for special findings. *Turner* v. *Kansas City, St. Joseph & Council Bluffs Railway Company*, 13.

2. ——— An answer of the jury to specific questions upon material issues that " we don't know," is equivalent to a finding that the plaintiff had not satisfactorily made out his case. *Flannery* v. *Kansas City, St. Joseph & Council Bluffs Railway Company*, 120.

3. ——— The questions submitted to the jury for special findings must be limited to the material issues, and such as are intelligible to the average juror. *Id.*

4. ——— PRACTICE.—Advantage can be taken of an abuse of this statute only by objections and exceptions made and saved at the time. *Id.*

5. AGAINST INSTRUCTIONS.—A verdict for one hundred dollars for the plaintiff should be set aside where the court has instructed the jury to find for the plaintiff in the sum of two hundred dollars, or to find for the defendant. *Wehringer* v. *Ahlemeyer*, 277.

6. SPECIAL.—An answer of the jury to a special interrogatory that, "we believe," etc., is sufficient. *McGuire* v. *Missouri Pacific Railway Company*, 325.

7. IMPEACHMENT.—A juror's affidavit can not be received to impeach a verdict, but may be received to support it. *McMurdock* v. *Kimberlin*, 523.

8. ——— PAPER FOUND IN JURY ROOM—WHETHER CAUSE FOR SETTING ASIDE VERDICT.—A paper found in a jury room, after the jury have left it, upon which twelve different sums, of various amounts, are set down and added together, and the amount divided by twelve, the quotient being the precise sum for which the verdict was rendered, does not furnish sufficient ground for setting aside the verdict. *Id.*

WAIVER. See GUARANTY, 1.

WILLS.

1. EQUITY—TRUSTS AND POWERS.—Under a will which provides for the payment, many years thereafter, with accumulated interest, of a small legacy out of the proceeds of the real estate devised to the executors, residue to the executors and others, the executors take an estate with power to convey, for the above purposes. *Drumheler v. Haff*, 161.

2. ——— BEQUESTS NOT A CHARGE UPON THE LANDS, WHEN.—In such a case, where the executors convey for a full consideration,

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WILLS—Continued.

they will be held to have executed this power, irrespective of whether the deed so recites, and the grantee takes the land discharged of the legacy. *Id.*

3. ——— APPLICATION OF TRUST FUND.—The executors in such a case being trustees for certain purposes which require time, discretion, and deliberation, the purchaser is not bound to see that the purchase money is properly applied. *Id.*

4. ——— LEGATEE'S REMEDY.—The legatee's remedy in such a case, where the legacy has not been paid, is against the executors and not against the land. *Id.*

WITNESSES. See EVIDENCE, 1, 2, 5, 7.

1. EVIDENCE—HUSBAND AND WIFE.—Competency of wife as to declarations respecting property in controversy. *Cottrell v. Spiess*, 85.

2. PHYSICIAN.—A physician is incompetent to testify indirectly to matters which the statute forbids him to tell directly. *Streeter v. Breckenridge*, 244.

3. REMOVAL OF INCOMPETENCY OF WITNESS—PARDON, EFFECT OF. The incompetency of a witness by reason of conviction of crime, can only be removed by a full pardon of the offence of which he was convicted. *The State v. Kirschner*, 349.

4. ——— FORMER STATUTES.—A person convicted of grand larceny in 1872, and by the statutes then in force, rendered incompetent to testify as a witness; is not rendered competent by the change made by the revision of 1879, and is still incompetent. *Id.*

5. IMPEACHMENT OF—PRACTICE—EVIDENCE.—The question as to whether a witness has been successfully impeached is one of fact, and, where there is substantial evidence on each side, is not reviewable on appeal. *Osborne v. Oliver*, 667.

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RULES GOVERNING PRACTICE

IN THE

KANSAS CITY COURT OF APPEALS.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room, and entertain and dispose of all oral motions.

Rule 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

Rule 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be acompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

Rule 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

Rule 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

Rule 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver, or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any Circuit Court, or any other Court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions: but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

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Rule 9.—Bill of Exceptions when General Statement of Evidence is Allowed by Trial Court. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

Rule 10.—Evidence.—Bill of Exceptions to be allowed, when. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence, shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

Rule 11.—Exceptions.—Questions to be embodied in bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Rule 12.—Duty of Circuit Court Clerks in making transcripts. The Clerks of the several Circuit Courts and other Courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*) "*Summons issued on the — day of —* 188–, *executed on the — day of —* 188–;" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 13.—Presumption that Bill of Exceptions contains all the Evidence. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the Court of first instance, it shall be presumed as matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 14.—Bill of Exceptions in Equity cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule 15.—Abstract and Briefs to be filed and served. In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this Court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

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The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent or defendant in error shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant or plaintiff in error may, if he desires, within five days after the service on him of the respondent's or defendant in error's abstract and brief as aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

Rule 16.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side paging, shall be set forth.

Rule 17.—Appellant's Brief to Allege Error Complained of. The brief on behalf of appellant or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

Rule 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

Rule 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defence and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to this Court the matters intended to be reviewed, and this statement with a certificate by the Judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

Rule 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

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Rule 21.—Motion for Affirmance. On motion for affirmance. under Section 3,717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24th, 1883, the mere fact that appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

Rule 22.—Extending time for filing Statements, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavits showing satisfactory cause.

Rule 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the Court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the court a written or printed argument.

Rule 24.—Notice on Motion to Dismissor Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial Court, shall first notify the adverse party, or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Attest:

F. C. FARR, *Clerk.*

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RULES OF PRACTICE

OF THE

ST. LOUIS COURT OF APPEALS.

IN FORCE ON AND AFTER MARCH 1, 1885.

Rule 1.—Appearance of Counsel. It shall be the duty of counsel for appellant or plaintiff in error to enter his appearance in this court, in writing, at least ten days before the first day of the term to which the appeal or writ is returnable; and of counsel for respondent or defendant in error to enter such appearance at least five days before said return day. Appearance may be entered by written notice to the Clerk of this Court, giving name and address of counsel. Appearance of additional counsel may be entered at any time before the hearing. No counsel will be recognized in a cause until his appearance is entered.

Rule 2.—Motions. All motions in a cause shall be in writing, signed by counsel and filed for record, and no motion shall be argued orally, unless the Court so directs.

Rule 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

Rule 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the clerk's office within five days after taking the same.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

Rule 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver, or return of service endorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

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Rule 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this court the action of any Circuit Court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

Rule 9.—Bill of Exceptions when General Statement of Evidence is Allowed by Trial Court. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

Rule 10.—Bill of Exceptions when General Statement of Evidence is Disallowed by Trial Court. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

Rule 11.—Exceptions to Admission or Exclusion of Evidence. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Rule 12.—Bill of Exceptions in Equity Cases. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

Rule 13.—Duty of Clerks in making out Transcripts. The Clerks of the several Circuit Courts and other Courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (*e. g.*) "*Summons issued on the — day of* — 188–, *executed on the — day of* — 188–;" and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 14.—Presumption that Bill of Exceptions Contains

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all the Evidence. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 15.—Briefs, When to be Filed. In all cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least ten days before the cause is called for trial, four copies of a brief, containing—*First.* A clear and concise statement of the pleadings and facts shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on. The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before the day on which the cause is called for hearing, and the counsel for respondent, or defendant in error, shall, at least five days before the cause is called for hearing, deliver to counsel for appellant, or plaintiff in error, one copy of his brief, points, and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the Clerk. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing. When no attorney has entered his appearance for the adverse side, filing copies of briefs with the Clerk shall be deemed sufficient service under this rule. It shall be deemed a sufficient compliance with Rule Fifteen, if a copy of a brief in any case shall be delivered to the adverse counsel within the time required by said rule: *Provided,* that the evidence of such delivery, together with the requisite number of copies of the brief, be filed with the Clerk at least one day before the day on which the case is called for hearing.

Rule 16.—Briefs After Submission. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon motion in writing and good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

Rule 17.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side paging, shall be set forth.

Rule 18.—Appellant's Brief to Allege Error Complained of. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the court shall otherwise direct.

Rule 19.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to

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comply with the provisions of rule numbered fifteen, the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at its discretion, continue to reset the cause, on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

Rule 20.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defence and the evidence, together with the rulings of the Court thereupon, and the exceptions saved to any ruling, which may intelligibly present to this Court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

Rule 21.—Motions for Rehearing. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the court, or that the decision rendered is in conflict with an express statute, or with a controlling decision to which the attention of the court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

Rule 22—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

Rule 23.—Oral Arguments. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the court a written or printed argument.

Rule 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal, or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party, or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given.

Rule 25.—Presiding Judge. The presiding judge shall superintend all matters of order in the court room, and entertain and dispose of all oral motions, but may delegate such duty to any of his associates.

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